

DOCUMENTS DEPARTMENT



SAN FRANCISCO
PUBLIC LIBRARY

ROOM

REFERENCE BOOK

Not to be taken from the Library

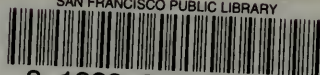
DOCUMENTS

APR 2 1969

MAR 25 1969

DOCUMENTS DEPARTMENT

SAN FRANCISCO PUBLIC LIBRARY



3 1223 90138 4447

VOLUME ONE

Appendix to the Journal of the Senate

LEGISLATURE OF THE STATE OF CALIFORNIA
1968 REGULAR SESSION

REPORTS

January 8, 1968—September 13, 1968



HON. ROBERT H. FINCH
President of the Senate

HON. HUGH M. BURNS
President pro Tempore

J. A. BEEK
Secretary of the Senate

*328.794

C12

1968

69 93

SAN FRANCISCO PUBLIC LIBRARY

VOLUME ONE

Pornographic Plays, Special Committee on

- ✓ An Investigation of the Production of *The Beard* on the Campus of California State College at Fullerton

Revenue and Taxation, Senate Fact Finding Committee on

- ✓ An Analysis and Evaluation of Proposals to the Ad Valorem Taxation of Business Inventories in California
- ✓ A Statistical Study of the Assessment and Taxation of Business Inventories in California

Water Resources, Senate Fact Finding Committee on

- ✓ Recreation at the State Water Project
- ✓ State Water Project Financing
- ✓ Repayment of Recreation and Fish and Wildlife Enhancement Costs of the State Water Project

Joint Legislative Committee for Revision of the Penal Code

- ✓ 1968 Report—Tentative Draft No. 2

SENATE SPECIAL COMMITTEE ON
PORNOGRAPHIC PLAYS

**An Investigation of the Production of "The Beard"
on the Campus of California State College
at Fullerton**

MEMBERS OF THE COMMITTEE

JAMES E. WHETMORE, *Chairman*

JOSEPH M. KENNICK
H. L. RICHARDSON

JOHN G. SCHMITZ
LAWRENCE E. WALSH



1968

Published by the
SENATE
OF THE STATE OF CALIFORNIA

HON. ROBERT H. FINCH
President of the Senate

HON. HUGH M. BURNS
President pro Tempore

JOSEPH A. BEEK
Secretary of the Senate

LETTER OF TRANSMITTAL

HON. ROBERT H. FINCH,
President of the Senate

Dear Sir :

The Senate Special Committee on Pornographic Plays created pursuant to Section 12.5 of the Standing Rules of the Senate and pursuant to Senate Resolution 50 herewith submits a report entitled *An Investigation of the Production of "The Beard" on the campus of California State College at Fullerton.*

The report constitutes the findings of this Committee as to the production of the play "The Beard" on the campus of California State College at Fullerton.

Respectfully submitted,

JAMES E. WHETMORE,
Chairman
JOHN G. SCHMITZ
LAWRENCE E. WALSH
JOSEPH M. KENNICK
H. L. RICHARDSON

TABLE OF CONTENTS

	Page
Letter of Transmittal	3
Page of Senate Journal showing resolution of authorization for hearing	7
Summary and statement by the committee	9
Introduction by the chairman	15
Script of <i>The Beard</i>	17
Three pictures taken by San Francisco police during climax of <i>The Beard</i> performance in that city	37
Excerpts from <i>The Dutchman</i> , a play presented at California State College at Fullerton	41
Excerpts from the <i>Free Press</i> , a newspaper regularly sold on the campus of the California State College at Fullerton	43
Two pictures introduced as proof of sale of the <i>Free Press</i> on the campus of California State College at Fullerton	45
Transcript of testimony at committee hearing	47
Appendix I. Statements entered into the record at the request of members of the public	
1. Statement of Sam Campbell	174
2. Statement by H. S. Samuels	175

TABLE OF CONTENTS—Continued

	Page
Appendix II. Documents entered into the record at the request of the administration of California State College at Fullerton	
1. Statement of Dr. William B. Langsdorf, President of the California State College at Fullerton	177
2. Statement of Dr. Paulina June Salz, Chairman of the Faculty Council of California State College at Fullerton	180
3. Statement of Dr. Miles D. McCarthy, representative of Faculty Council and Chairman of the Committee on Academic Freedom and Ethics of the California State College at Fullerton	182
4. Statement of Dr. David Malone, Professor of Comparative Literature and Chairman of the English Department at the University of Southern California	184
5. Statement of the Faculty Council Committee on Academic Freedom and Ethics of the California State College at Fullerton	187
6. Statement of the Advisory Board of the California State College at Fullerton, presented by Leland C. Launer, Esq., Chairman	189
7. Affidavits in connection with the performance of <i>The Beard</i> at California State College at Fullerton	191
Appendix III. Special statements	
1. Statement of Dr. Glenn S. Dumke, Chancellor of California State Colleges	193
2. Statement of George St. Johns, President of California State College Student Presidents Association	196

PAGE FROM SENATE JOURNAL SHOWING RESOLUTION OF AUTHORIZATION FOR HEARING

By Senator Whetmore :

Senate Resolution No. 50 Relative to pornographic play

WHEREAS, The California State College at Fullerton has allowed the presentation on campus of three performances of a most objectionable and notorious play containing hundreds of obscenities and depicting as its climax a perverted act of sexual intercourse, and constituting in general a situation of intolerable dimension; and

WHEREAS, The District Attorney of Orange County has been asked to cooperate in the matter of ascertaining whether or not certain sections of the Penal Code were violated by the producers and participants in these performances; and

WHEREAS, There also appears to have been possible contribution to the delinquency of minors by virtue of the fact that many in the audience of over two hundred persons were minors; and

WHEREAS, There is some question as to whether present law is sufficient to prevent the recurrence of such an incident or capable of insuring proper discipline of students and faculty should such an incident recur; now, therefore, be it

Resolved by the Senate of the State of California, That the Senate Committee on Rules is hereby directed to assign to a committee of five members of the Senate appointed from the General Research Committee, for study the subject of legislation necessary to prevent the recurrence of such an incident and to direct such committee to report its findings and recommendations thereon to the Senate as soon as possible during the 1968 Regular Session of the Legislature.

Referred to Committee on Rules.

SUMMARY AND STATEMENT BY THE COMMITTEE

There was no dispute as to the fact that *The Beard* and *The Dutchman* were both presented on the campus of the California State College at Fullerton and that both of these plays were under the direction of Terry Gordon, a student in a class instructed by Mr. Edwin Duerr, a member of the faculty.

There was also no dispute as to the sale of the *Free Press* regularly on the Fullerton campus.

There was no dispute as to the intention at the end of the performance of *The Beard* to portray an act of oral copulation and though the administration of the college seemed greatly concerned that some persons might think actual oral copulation, rather than simulated oral copulation took place, the testimony generally, though not incontrovertibly, was to the effect that the sexual act was simulated rather than real.

There is no disagreement as to the fact that the student selected the play *The Beard*, his instructor, Mr. Edwin Duerr, allowed it to be used and issued over 300 slips entitling persons to attend.

Also undisputed was the fact that Dr. James Young, head of the drama department, saw the first performance of *The Beard*, allowed two more performances to continue on the day following, that both the actor and actress in all performances of *The Beard* were nonstudents, neither being enrolled in California State College at Fullerton at the time of the performances, and that in certain areas a person may take a class such as drama over and over again, receiving credit each time, and that this was the case as far as student director of *The Beard*, Terry Gordon, was concerned.

It is also undisputed that Mr. Edwin Duerr was allowed to receive tenure on December 1, 1967, after the controversial performances of *The Beard*, after the newspapers printed the facts but before the Senate investigating committee convened to investigate the performances of *The Beard*.

The committee was particularly interested in certain parts of the testimony to be found in the transcript. Since the facts were to a great extent not in dispute, the committee turned its attention to the attitude of the various persons on the campus in connection with performances of *The Beard* and *The Dutchman* and the sale of the *Free Press*. As an indication of this attitude, the following excerpts of the testimony are submitted in summary.

Mr. Charles L. Ford, head of the drama department of Santa Ana College, called at the request of the administration of California State College at Fullerton, stated under questioning that *The Beard* might be suitable for experimental work at a four-year college and is not immoral. Further questioning revealed that in his present state of mind he did not know whether the words used in *The Beard* were offensive or not.

Dr. Roger Dittman, member of the faculty and called at the request of the administration of California State College at Fullerton, stated the final act of *The Beard* seemed "almost like a ballet, you know, with the straightened, graceful limbs and simulated act of sexual intercourse or cunnilingus. . . ." In response to a question as to whether he would recommend it to his students he said, "I think I would."

He stated he believed *The Dutchman* suitable to be presented on college campuses and stated that he is not offended by any sex act.

James Brock, a reporter for the Santa Ana *Register*, stated under oath that he was excluded from a meeting held on the California State College at Fullerton campus to discuss *The Beard* and that campus reporters were allowed to attend. Further testimony confirmed this to be the case.

The committee was particularly interested in the testimony of Mr. Edwin Duerr in whose class both *The Beard* and *The Dutchman* were performed.

He stated that *The Beard* was in the mainstream of American drama today and that plays about desegregation are also in the mainstream. In response to the question, "Do you feel it was a mistake that it was put on or do you feel that it was a mistake that there were reporters present in the audience?" Duerr's response was, "It was a mistake that I gave out the permissions, as I call them—not tickets—in such a way that people got in who were——". The next question was, "But you don't feel it was a mistake to put the play on?" In response to this, Duerr's answer was, "No, not at all."

Duerr stated that in his opinion Americans have a "hang up" about sex and that *The Beard* is trying to say, "Let's not make sex guilty."

Duerr stated his admission system didn't work, "Somebody gave this to the press. There was something diabolical going on here."

Duerr stated that he is not sure that the play was completely upsetting to the community and not sure that being upset is wrong. He said plays should upset people, that it is "one of the rights of a play, to shake people up."

Duerr stated but for the furor created by the presentation of *The Beard* there would be "no question at all" but that he would put it on again.

Duerr stated again that both *The Beard* and *The Dutchman* are in the mainstream of drama, and that he does not consider *The Beard* at all vulgar and that since oral copulation is a part of sex, it is a normal human act the same as eating, sleeping or swimming.

Dr. James Young, chairman of the drama department of California State College at Fullerton, stated that he, personally, would not put on *The Beard* or *The Dutchman* but that if presented as a classroom project, the decision to present these plays should be up to the class instructor, not himself as head of the drama department.

Paul Omar Stilwell, a maintenance foreman for the City of Fullerton, stated that he received his ticket to see *The Beard* from an employee who found it in the parking lot at City Hall and that the presentation was a disgrace to both the school and people of Fullerton.

A very hostile witness, Frances Wood, admitted that she witnessed the second performance of *The Beard* without any ticket whatsoever, that she just walked in.

Dr. Shields, an administrator at California State College at Fullerton, stated that the doors were open for the last performance since it was unannounced.

Dr. Miles D. McCarthy, chairman of the Faculty Council Committee on Academic Freedom and Professional Ethics at California State College at Fullerton and called at the request of the college, when questioned as to whether the production of *The Beard* and *The Dutchman* and the sale of the *Free Press* on the campus were mistakes, refused to answer directly. He stated that perhaps there was an error in the way "this was done" and stated that he would "go along with" those in charge of the drama department.

Dr. David Malone, chairman of the English department and professor of comparative literature at the University of Southern California, called at the request of the administration of California State College at Fullerton, stated that the "mistake" in connection with the production of *The Beard* was in allowing persons not in the drama department to see the production, that it was a proper part of the instructional program and the taxpayers who pay taxes for the production should, since they are not enrolled in the drama class, be denied admittance to the performance. He stated further that college-age minors should be admitted if enrolled in the drama department. When shown pictures by the committee depicting the oral copulation scene at the end of the play, he stated that in his opinion, they were not pornographic.

Dr. George C. Forest, assistant professor of drama at California State College at Fullerton, in response to a question, stated that in his opinion *The Beard* was an "esthetically tasteful and entertaining production—a humorous and honest work of art" and that he would not only recommend it to his students but that he would "insist."

President of the Associated Students, Nick Chilton, outspoken critic of the investigation, stated in response to a direct question that the hearings had been fair.

Dr. Stuart Silvers, philosophy department, California State College at Fullerton, stated that he does not disapprove of plays like *The Beard* and *The Dutchman* and that he would recommend both of these plays to students to see as something that they might "develop or find some enjoyment or knowledge from."

The committee was also very interested in the testimony of Dr. William B. Langsdorf, President of California State College at Fullerton.

Excerpts from his testimony follow.

Dr. Langsdorf repeatedly refused to give an opinion as to whether or not it would be proper to perform *The Beard* on a tax-supported college campus. He stated that the decision should be left up to "professionals."

Dr. Langsdorf refused to answer directly the question as to whether the performance of *The Beard* and *The Dutchman* and the sale of the *Free Press* were proper for his campus.

Dr. Langsdorf stated he would allow *The Dutchman* to be presented again on his campus but not *The Beard* and the reason he would not allow *The Beard* to be produced was he believed the intent of anyone asking to present *The Beard* would be an intent to affront the community. (The committee noted that he would not say, though given every opportunity, that the reason he would not allow *The Beard* to be presented again was that it was immoral or a bad play.)

Dr. Langsdorf stated in response to a question as to the colleges' job in connection with morals, "I might make these two comments: First, that by the time young people arrive at college, their moral characters are pretty well determined. . . . If they're bad, they already are bad and if they're good, they already are good. The college level has very little determination actually in that regard.

"Secondly, I think if you mean that the college should not challenge the existing mores and existing customs, I think it is the function of higher education to investigate and challenge everything."

Dr. Langsdorf stated he would oppose legislation designed to prevent a recurrence of a performance of *The Beard* and that he would oppose legislation to allow the press access to campus activities.

Mr. Duerr was recalled late in the hearing and, in response to the question, "All right, was in this play simulated oral copulation a part or was oral copulation a part of the play?" Mr. Duerr's answer, "I just don't know." The next question was, "As the producer you just don't know?" The answer was, "I just don't know."

A number of bills in connection with the state colleges were introduced at the 1968 session of the Legislature, some as a consequence of the hearings. These consisted of legislation which would:

Place responsibility on the college presidents for activities which might damage the colleges' public image (SB 419);

Require that all meetings on campuses be open to the press (SB 485);

Require approval of the Senate and Assembly for appointees to the board of trustees (SB 486 and 489);

Prohibit acts of simulated sexual intercourse in plays, etc. on the campuses (SB 487);

Require state colleges to reveal the amount of money spent each year in activities influencing legislation (lobbying) (SB 491);

Require college presidents to expel students and dismiss academic employees initiating acts of force or violence on college property. (Expelled students prohibited from readmission within one year from expulsion, future employment of academic employees prohibited at any time) (SB 539);

Condemn trustees for changing from "mandatory" to "permissive" regulations adopted December 9, 1967, concerning dismissal or suspension of students, faculty members or employees disrupting college activities (SR 65);

Require any CSC president to place on probation, suspend or expel any student for disorderly, unethical, vicious or immoral conduct or misuse, abuse, theft or destruction of state property (AB 1760).

ALL OF THE ABOVE-MENTIONED LEGISLATION WAS VIGOROUSLY OPPOSED BY THE LEGISLATIVE ADVOCATES OF THE STATE COLLEGES AND BY CHANCELLOR DUMKE.

After a complete evaluation of the transcript, the committee finds as follows:

1. That the facts as presented to the Senate before the introduction of the resolution were borne out completely by the investigation as having been a factual representation of what took place, and that the investigation was warranted and necessary.

2. That the committee in subpoenaing and hearing testimony from far more witnesses for the college than from all other sources, allowed the college every opportunity to present to the public its viewpoint, and that the investigation was fair, impartial, and completely objective.

3. That the attitude of the participants, students and witnesses testifying for the college showed little or no concern for the fact that *The Beard* was selected or presented, but that rather for the fact that the press and public were allowed to find out about it.

4. That while the president of the college admitted that it was a mistake on the part of Mr. Duerr to present *The Beard* and that it was in poor taste and showed bad judgment, Professor Duerr was still recommended for tenure after the performance and before the Senate investigation could be held. The committee is appalled that tenure was granted under these circumstances.

5. That *The Dutchman* by LeRoi Jones was also presented on the Fullerton campus prior to *The Beard* by the same professor and the same director, and that the president of the college stated in essence that in his view this presentation was not necessarily improper in spite of the fact that very offensive language, similar to that of *The Beard* is contained in *The Dutchman*.

6. That in the course of the investigation it was brought out that a publication using similar language and judged by many to be obscene, entitled the *Los Angeles Free Press*, has been, and is currently, sold on the newsstand at the Fullerton campus, and that the president, in spite of a Legislative Counsel's opinion to the effect that he could prohibit the sale of this publication, has not in the past, and will not in the future, agree to do so.

7. That the college administration and professors on this campus appear to be much more concerned over their image among their fellow

workers than with making any attempt to provide a proper moral climate in which the students are educated.

8. That there appears to be no person willing to accept responsibility for activities on the campus, since in the testimony it was brought out that the chancellor seemed to feel the responsibility belonged to the president, the president to the head of the drama department, the head of the drama department to the classroom professor, and the classroom professor, Mr. Duerr, stated that the play was selected by a student.

As to whether *The Beard* is or is not obscene, the hearing brought out the fact that according to an expert witness, James Clancy, who has spent many years as an attorney working directly with governmental agencies in this field, a 27-minute film which was declared to be obscene by the Supreme Court was far less pornographic and offensive than *The Beard*.

The committee was appalled that the president of the college, when asked whether in his opinion the college had any responsibility for the creation or maintenance of standards of morality on the campus, replied, in essence, that since studies have shown a person's morals to be established before or at the time they reach college level, he felt that there appeared to be little the college could or should do regarding the moral climate surrounding its students. The committee feels that if this reasoning were carried to its logical conclusion, there would be no reason to attempt rehabilitation in any of the thousands of adult corrective institutions, and that to say that a person's moral standards are unequivocally established at or before college level is completely fallacious.

The committee was amazed by the manner in which the student body, faculty, and administration joined hands to protect and defend the persons who put on the presentation of *The Beard* and *The Dutchman* as shown by the fact that there was not one single witness called by the college who voiced opposition to the presentation, nor did a single member of the college faculty contact the committee in an effort to testify that the presentation of the play on the campus was improper.

The committee was appalled by the fact that the president of the college clearly stated that he would take no action against the distribution of any material on the campus, unless this had been declared by a court to be obscene, while at the same time stating that he believed it was his job to take leadership and set policy. The committee feels that in refusing to do anything until it is declared illegal the administration is placing its view of academic freedom above morality and community responsibility.

The committee further finds that the administration and professors heard from at the hearing appear to place themselves and their judgment above and beyond that of the Legislature and the public, that they are totally unresponsive to anyone and clearly feel that the taxpayers should not concern themselves in any way with campus activities since the taxpayers are not "experts" in educational matters.

INTRODUCTION BY THE CHAIRMAN

This committee is authorized by the Senate of the State of California under SR 50 of the 1967 Second Extraordinary Session to investigate and report to the Legislature matters concerning certain incidents alleged to have taken place on the campus of the California State College at Fullerton. The purpose of the legislative report is to enable the members of the Senate to determine whether or not legislation should be proposed in this area and if proposed, what form the legislation should take.

A Senate investigative committee is given a number of powers under the Government Code and the Rules of the Senate, among which are the power of subpoena of records, compelling attendance and the asking of any and all questions of witnesses at any time by the members of the committee.

All witnesses subpoenaed by this committee and testifying under oath before it are given immunity by sections of the code from all prosecution as to matters pertaining to their testimony. The result of this is that it is neither possible nor necessary for a witness to refuse to testify because of the "Fifth Amendment," since this refusal is made on the grounds that the witness might be incriminated.

It is the intention of the committee to investigate several matters concerning the Fullerton campus and if possible to place evidence concerning all of these matters before the committee first in the form of eyewitness or documented testimony, and thereafter call witnesses before the committee as required to comment on this evidence, and if desired by members of the committee, to answer questions about it.

It is the intention of this committee and my intention as chairman to confine these hearings to testimony about the incidents concerned, and to exclude extraneous testimony, if the introduction of such testimony is attempted. It is my intention to follow this procedure explicitly, and all witnesses are requested to confine their testimony absolutely and completely to the issues before the committee.

It was with great reluctance that the resolution authorizing this investigation was introduced by myself, and all members of the committee, including myself, regard it as most unfortunate that this investigation should take place. Believe me, ladies and gentlemen, Senators have many duties far more pleasant than the duty we are facing this morning.

Nevertheless, the committee feels that we as legislators have an obligation to those whom we represent. Each of the members of this committee here assigned today represents approximately half a million people, and so before you are representatives of about 2½ million people, or about 15 percent of the population of this state. The committee believes that many of these people are disturbed by events that have taken place, not only on the Fullerton campus but on many other tax-supported campuses and again, let me say that it is with only the greatest of reluctance we of the committee have embarked upon this task.

It has been said before and will be said again of committees such as this that we seek publicity. Let me remind you that the five Senators

seated here won their elections long before the events which we are about to inquire into took place.

It has been said of this committee that its creation was designed to damage the public image of this great campus here in Fullerton. Let me remind you that no member of this committee either produced or participated in the production which has caused the recent public furor, and that if anyone is to blame for damaging the public image of this great campus, the blame must lie in the area of those whose actions created the furor rather than those who are elected by the people long before November 8 and 9 of 1967 to guard their public funds, and perhaps to a degree, the moral climate in which their offspring are brought up.

It has been said that the purpose of this committee is to censor, though what and who we are supposed to be censoring has never been made clear. It has been said it is the intention of this committee to limit academic freedom and by these same persons it has been said that academic freedom cannot be defined. Let me remind you that neither in the resolution authorizing this committee or in any public statements by any members of this committee has any intention to censor been indicated, and that as to academic freedom, many persons believe that perhaps the time has come to decide if possible where academic freedom degenerates into license. Perhaps the time has come to point up the fact that every freedom carries with it a corresponding responsibility and that those who partake of freedom of any sort should also show responsibility in its exercise.

These are the things, ladies and gentlemen, that this committee hopes to do, and I say to you here and now that from long personal acquaintance with the other members of this committee that I can assure you no member of this committee will retreat from this task.

Now as our hearings begin, may I say to all of you, regardless of our political faiths, beliefs, or differences of opinion, that the first duty of all of us is to make our society a better place in which to live. Let us go forward then, you I, and all of us together, to keep California's colleges as they are today—the finest institutions of learning to be found anywhere in the world.

SCRIPT OF "THE BEARD"

Parts of the script of *The Beard* have been deleted, and only excerpts have been used in order to assure compliance with copyright regulations.

HARLOW and BILLY THE KID *wear small beards of torn white tissue paper.*

Harlow's hair is in her traditional style. She wears a pale blue gown with plumed sleeves.

BILLY THE KID *wears shirt, tight pants, and boots.*

HARLOW *has a purse.*

The set contains two chairs and a table covered with furs—there is an orange light shining on them.

HARLOW: Before you can pry any secrets from me, you must first find the real me! Which one will you pursue?

THE KID: What makes you think I want to pry secrets from you?

HARLOW: Because I'm so beautiful.

THE KID: So what!

HARLOW: You want to be as beautiful as I am.

THE KID: Oh yeah!

HARLOW: Before you can pry any secrets from me, you must first find the real me! Which one will you pursue?

THE KID: What makes you think I want to pry secrets from you?

HARLOW: Because I'm so beautiful.

THE KID: So what!

HARLOW: You want to be as beautiful as I am.

THE KID: Oh yeah! (*Pause. He grabs her arm.*) I'VE GOT YOU!

HARLOW: It's an illusion!

THE KID: (*Squeezing her arm and raising it.*) You mean this meat isn't you?

HARLOW: What do you think?

THE KID: What makes you think you're so beautiful?

HARLOW: Oh, my thighs . . . my voice . . .

THE KID: What about your hair . . . ?

HARLOW: What do you think?

THE KID: Your hair came out of a bottle.

HARLOW: You're full of shit! My hair is beautiful and it didn't come out of any bottle—it's like this.

THE KID: Show me your baby pictures!

HARLOW: You're crazy! Why?

THE KID: To see your hair!

HARLOW: You ARE jealous.

THE KID: You're full of shit!

HARLOW: It's blond—don't worry! You've got buck teeth!

THE KID: SHUT UP!

- HARLOW: You'd like to be beautiful! Maybe you'd even like to be pretty. You wear your hair down to your shoulders. Maybe you'd like to be a chick!
- THE KID: (*He takes hold of her arm—rolls it in his fingers.*) THIS IS NOTHING BUT MEAT! (*He sneers.*)
- HARLOW: Before you can pry any secrets from me, you must first find the real me!
- THE KID: What makes you think I want to pry secrets out of you?
- HARLOW: Because I'm so beautiful.
- THE KID: So what!
- HARLOW: You want to be as beautiful as I am!
- THE KID: Oh yeah!
- THIS IS NOTHING BUT MEAT! (*He squeezes her bare arm and rolls it in his fingers.*)—Why should I want to be beautiful?
- HARLOW: Oh . . . You're a man.
- THE KID: Yeah?
- HARLOW: You're a man . . . And men want to be beautiful.
- THE KID: I'm sick of that word . . . it makes me want to puke!
- YOU'RE A BAG OF MEAT!
- HARLOW: What word?
- THE KID: *Beautiful*. I'm sick of hearing that word coming from a bag of meat.
- HARLOW: Don't touch my arm again!
- THE KID: Or?
- HARLOW: I'll cut your dumb brain open like a bag of meat.
- Don't you think I'm . . . lovely . . .
- THE KID: You smell like myrrh. Come and sit on my lap. (*He pulls her arm.*)
- HARLOW: What if somebody came in and looked!
- THE KID: In eternity.—There's nobody here!
- HARLOW: You said I'm a bag of meat! And you said shit about my hair!
- THE KID: Maybe I love you.
- HARLOW: You're full of shit. WHO CAN LOVE IN ETERNITY?
- THE KID: (*With sureness.*) Sit on my lap.
- HARLOW: You're a million miles away, Sweet.
- THE KID: Not in eternity! . . . Sit on my lap!
- HARLOW: FUCK YOU!
- THE KID: YOU'RE A BAG OF MEAT! A white sack of soft skin and fat held in shape by a lot of bones!
- HARLOW: (*Pulling dress up high.*) So?
- THE KID: (*Suddenly.*) I think your hair's blond!
- HARLOW: Really blond?
- THE KID: Yes!
- HARLOW: You're a sack of shit!
- THE KID: Sit on my lap!
- HARLOW: Before you can pry any secrets from me, you must first find the real me! Which one will you pursue?
- THE KID: What makes you think I want to pry secrets from you?
- HARLOW: Because I'm beautiful.

THE KID: So what!

HARLOW: You want to be as beautiful as I am

THE KID: Oh yeah! Come here, and sit on my lap and lick my boots!

HARLOW: You're full of shit! You wish you were a chick!

THE KID: Come here, and sit on my lap. I'll let you lick my boots.

HARLOW: Why should I lick your boots?

THE KID: You'd love to!

HARLOW: Before you can pry any . . .

THE KID: SHUT UP!

HARLOW: You'd like to grab my blond hair in your hands?

THE KID: So what!

HARLOW: You'd like to see me crawl?

THE KID: (*Shrugs.*)

HARLOW: Why should I lick your boots?

THE KID: (*Shrugs.*) Come here and sit on my lap then.

HARLOW: Why do you want me to lick your boots?

THE KID: I'd like to make speeches like big thick clouds.

HARLOW: You will, Baby, you will.

THE KID: What if I talk like this—NICE AND LOUD!

HARLOW: You want me to lick your boots, huh? That's no way to steal beauty, Kid.

THE KID: Maybe I'll take your blond hair in my hands.

HARLOW: Why don't you, Kid?

THE KID: Come here and sit on my lap and lick my hands.

HARLOW: Why don't you take me by the hair then?

THE KID: Maybe I will.

 Come over here and sit on my lap, Babe.

HARLOW: One chick on another chick's lap! You're full of shit!

THE KID: Before you can pry any secrets out of me, you must first find the real me! Which one will you pursue?

HARLOW: What makes you think I want to pry secrets from you?

THE KID: Because I'm beautiful.

HARLOW: So what?

THE KID: You want to be as beautiful as I am.

HARLOW: You're nothing but meat pushed into a bag of skin with buck teeth and long hair.—And you want me to kiss YOUR boots.

THE KID: Come here and sit on my lap and I'll let you hold my cock.

HARLOW: Now wouldn't I like THAT!—A chunk of meat hanging from a hunk of meat!

THE KID: And afterwards you can lick my boots! (—Which one of me will you pursue?) Maybe you'll find I'm sheer spirit taking the guise of meat.

HARLOW: What makes you think I'd want to lick YOUR boots?

THE KID: Because there are rainbows on them! Rainbows reflected on sheer black.

HARLOW: Let me see.

THE KID: (*Holds his boots in the light.*)

HARLOW: They're not bad.

THE KID: Come and sit on my lap.

HARLOW: You're a cunt!

THE KID: Sit on my lap.

- HARLOW: And you'll take my blond hair in your crumby hands! Why should I lick your boots or sit on your lap?
- THE KID: There's nobody here.
- HARLOW: Why should I lick your boots or sit on your lap?
- THE KID: **THERE'S NOBODY HERE!**
- HARLOW: Nobody to see, you mean? Huh?
- THE KID: That's right. There's nobody here. Sit on my lap.
- HARLOW: What if I DID?
- THE KID: You could lick my boots then . . . and touch my cock!
- HARLOW: You must first find the real me! Which one will you pursue?
- THE KID: There's only one you!
- HARLOW: You're full of shit! O.K., I'm sick of this! What do you want?
- THE KID: I want you to sit on my lap and touch my cock.
- HARLOW: I don't give a fuck where we are . . . I'm sick of this talk!
- THE KID: Then shut up! You started it!
- HARLOW: What I said was: Before you can pry any secrets out of me, you must find the real me! Which one will you pursue?
- THE KID: I'm sick of this shit, too! It's a fucking rite! It makes me think of one of those steel-black wasps crawling over blue velvet.
- HARLOW: And I suppose you're soft and real!
- THE KID: **FUCK YOU!**
- HARLOW: I'm real *wherever* I am!
- THE KID: (*Sneering.*) Well, I'm real too.
- HARLOW: Your eyes are crazier than Hell! They stare! You're out of your mind! Before you can pry any secrets out of me, you must first find the real me! Which one will you pursue?
- THE KID: I wouldn't follow you across an empty street.
- HARLOW: Well, you're **HERE!**
- THE KID: You're here too!
- You say you're an illusion—and there's more than one you!
And you say my eyes are crazy! **SHOVE OFF!**
- HARLOW: (*Stands. Looks around.*) There's nothing here but blue velvet!
- THE KID: Yeah. (*Smiling, crossing leg.*)
-
- HARLOW *walks around stroking the velvet. Pauses. Adjusts herself in the chair sexually.*
-
- THE KID: What makes you say my eyes are crazy?
- HARLOW: **I DON'T WANT TO TALK ABOUT IT.**
(*Pause.*) Why do you say I'm an illusion?
- THE KID: You said it, not me!
- HARLOW: Yeah. (*Thinking.*)
(*Pause.*)
Your eyes are crazy because you're full of shit, Sweetie.
- THE KID: I despise dirty-mouthed chicks.
- HARLOW: Let's be clean . . .
- THE KID: O.K.
(*Pause.*)

- HARLOW: (*Angrily.*) FUCK YOU!
 (*Pause. KID takes out handkerchief and polishes toes of his boots.*)
 FUCK YOU! FUCK YOU! FUCK YOU!
 (*Pause. KID polishes toes of boots.*)
 FUCK YOU! FUCK YOU! OHHhhh FUCK YOU!
- THE KID: And you say I'm crazy.
- HARLOW: You're crazier than Hell, you frozen-eyed bastard!
- THE KID: Can't you be clean?
- HARLOW: How about you?
- THE KID: (*Shrugs. Holds up his boot.*) How about that!
- HARLOW: You make me sick talking about your lap and your boots!
- THE KID: And my cock?
- HARLOW: That too! And calling me a bag of meat!
- THE KID: You said you were an illusion!
- HARLOW: Fuck you!
- THE KID: And you called me dumb and crazy.
- HARLOW: That was way back then in the rite.
- THE KID: Everything is NOW.
- HARLOW: You ARE crazy! (*Curls up in chair.*) I'm going to sleep
 . . .
- THE KID: In eternity?
- HARLOW: Skip it! (*Makes herself more comfortable.*)
 (*Pause.*)
- THE KID: Hey!
- HARLOW: I'm asleep!
- THE KID: Come and sit on my lap.
 (*No action.*)
 Hey!
 (*No action.*)
 Hey!
- HARLOW: (*Leaping up.*) YOU'RE OUT OF YOUR MIND!
- THE KID: In eternity? (*Squinting.*) How can I be out of my mind in eternity?
- HARLOW: If eternity is blue velvet it's a bunch of shit!
 (*Paces.*)
- THE KID: Maybe it's not!
- HARLOW: (*Pacing.*) Not what?
- THE KID: Velvet! (*Watches her pace.*)
 Sit down!
- HARLOW: WHAT?
- THE KID: Sit down.
- HARLOW: (*Angrily.*) In your lap?
- THE KID: (*Quietly and firmly with a gesture.*) Sit down.
-
- HARLOW sits back down in chair.—*They stare at each other.*
-
- HARLOW: (*Enticingly.*) Before you can pry any secrets from me, you must first find the real me! Which one will you pursue?
- THE KID: SHUT UP!
- HARLOW: Before you can pry any . . .
- THE KID: (*Leaping up as if to strike her.*) SHUT UP!

HARLOW: Before you can pry any . . .
 THE KID: (*Raising hand to strike her.*) SHUT UP!! SHUT UP!!
 GOD DAMN YOU! SHUT UP!
 HARLOW: (*Putting hand over mouth.*) Ho hum. (*Stretches.*) Ho hum.
 Ho hum. Ho . . . Ho . . . HOoooooooooooo . . . Ho hum.
 (*Looking directly at KID.*) Sit down you dumb fuck!

THE KID *sits down again, hands on his knees, staring at*
 HARLOW. *Long pause.*

THE KID: (*Serious/concentrated.*) We can do anything we want to
 do here . . . There's nobody around to watch.
 HARLOW: (*Stretching languorously.*) Just like grownups, huh?
 THE KID: (*Leaning toward her.*) There's no one to watch.
 HARLOW: (*Stretching more luxuriously.*) No one can see us, huh?
 THE KID: That's right.
 HARLOW: What do you want to do?
 THE KID: Just what I said.
 HARLOW: That's what you want ME to do.
 THE KID: That's right!
 HARLOW: Sit on a tack!
 THE KID: You know that's what you'd like to do . . .
 HARLOW: Sit on your lap and play with your cock?
 THE KID: Yeah!
 HARLOW: (*Stretching.*) OOOOOoooooooooh . . . (*Stretching arms.*) Ho
 . . . Ho . . . Ho humm. You're out of your nut!
 THE KID: There's nobody here, Baby!
 HARLOW: So what!
 Let me sleep. (*Curls up.*)
 (*Pause. HARLOW feigns sleep.*)
 THE KID: I don't want to pry any secrets from you.
 HARLOW: I was just talking . . . That's all right.
 THE KID: I really don't.
 HARLOW: (*Sleepily.*) It's all right.
 THE KID: What shall we do?
 HARLOW: Sleep.
 THE KID: No! WE'RE ABSOLUTELY FREE!
 HARLOW: (*Sleepily.*) Shut up!

* * * * *

there's nobody around?

THE KID: Sure!
 HARLOW: What's so great about your boots?
 THE KID: Rainbows reflected on sheer black!
 HARLOW: O.K., what if I sit on your lap?
 THE KID: And touch my cock?
 HARLOW: My God!
 THE KID: My bare cock with your hand!
 HARLOW: I'm going to go to sleep!
 THE KID: God damn you!
 HARLOW: You've got a dirty mouth! (*Pause.*) What did you mean
 when you said I'm an illusion?
 THE KID: I didn't say it—you did. I said you're a bag of meat!

- HARLOW: Then what's so great about me?—What do you want with a bag of meat? (Before you can pry any secrets from me, you must first find the real me! Which one will you pursue?) What do you mean—bag of meat?
- THE KID: Why don't you find the real you and pursue it yourself!
- HARLOW: Screw you!
- THE KID: Come over here and sit on my lap!
- HARLOW: All right there's nobody here. So what!
(Pause. No action. HARLOW curls herself up.) I'm going to sleep.
- THE KID: A bag of meat is a bag of meat!
- HARLOW: (Sits bolt upright.)
- THE KID: Stuffed with fat and bones!
- HARLOW: You're a pain in the ass!
- THE KID: In eternity?
- HARLOW: Sure, wherever you are!
- THE KID: Good night!
- HARLOW: Fuck you! You're a prim little cunt for a tough guy!
- THE KID: A bag of meat is a bag of meat!
- HARLOW: (Pulls dress up leg.) Look at that!
- THE KID: Come and sit on my lap!
- HARLOW: For Christ sake!
- THE KID: What makes you think I want to pry secrets from you?
- HARLOW: You don't interest me!
- THE KID: Not in eternity?
- HARLOW: Not even in eternity!
- THE KID: I'll bet!
- HARLOW: That's right!
- THE KID: You're lying. (Pause. HARLOW feigns sleep.) Hey! You're a NICE bag of meat!
- HARLOW: For Christ sake!
- THE KID: I like your leg.
- HARLOW: It's a bag of meat.
- THE KID: Yeah.
- HARLOW: So?
- THE KID: I like a nice bag of meat.
- HARLOW: You're a crude S.O.B.
- THE KID: And buck-toothed?
- HARLOW: With your hair hanging halfway down to your crack like a floozie!
- THE KID: Before you can pry any secrets from me, you must first find the real me! Which one will you pursue?
- HARLOW: Shit!
- THE KID: Before you can pry any . . .
- HARLOW: Shit!
- THE KID: Before you can pry any secrets from me, you must first find the real me . . .
- HARLOW: O.K., who are you?
- THE KID: Blue velvet.
- HARLOW: That's an illusion. You look like a hunk of meat.
- THE KID: Sit on my lap!

- HARLOW: And I suppose I'm supposed to be blond hair—like blond hair on blue velvet?
- THE KID: Suit yourself!
- HARLOW: O.K., together we're blond hair on blue velvet.
- THE KID: That's not enough.
- HARLOW: What's not enough?
- THE KID: Blond hair on blue velvet!
- HARLOW: I suppose because there's nobody around there should be something more?
- THE KID: Yeah!
- HARLOW: Like what?
- THE KID: Like . . .
- HARLOW: —Sit on a tack!
- THE KID: It's not a tack you'd like to sit on.
- HARLOW: Yeah!
- THE KID: It's something else.
- HARLOW: Like what? Your lap?
- THE KID: You're close!
- HARLOW: Awhh!
(Pause.)
- THE KID: Blond hair on blue velvet isn't enough! Maybe I love you.
- HARLOW: What's love! You're jealous of my beauty!
- THE KID: I don't give a fuck about your beauty! If I wanted you I'd want YOU!
- HARLOW: Oh yeah? I'm sick of hearing about your boots!
- THE KID: When I say *boots* I don't mean boots.
- HARLOW: What do you mean then?
- THE KID: When I say blond hair and blue velvet I don't mean that either.
- HARLOW: What do you mean then?
- THE KID: By boots?
- HARLOW: Yeah, by boots.
- THE KID: I don't give a fuck about beauty! If I wanted you I'd want YOU!
- HARLOW: You said that. What do you mean by boots?
- THE KID: My cock!
- HARLOW: Oh my God!
- THE KID: MY COCK!
- HARLOW: I'm going to look at the walls. (HARLOW *walks stroking walls.*) They're nice!
- THE KID: I'm your walls!
- HARLOW: Shit! (Pause.) What do you mean I'm fat?
- THE KID: I said you're a real blonde!
(Pause.)
I'm your walls to rub against.
- HARLOW: HERE?
- THE KID: Anywhere!
- HARLOW: They're soft.
- THE KID: I'm soft too.
And hard as a rock!

- HARLOW: (*Walks looking at walls and stroking them.
Looks directly at KID.*)
Bullshit!
Before you can pry any secrets from me, you must first find the real me!
- THE KID: Yeah!
- HARLOW: Find it!
- THE KID: Sit on my lap and stroke my cock!
- HARLOW: You're a fucking monomaniac!
- THE KID: And lick my boots.
- HARLOW: You said it wasn't your boots!
... Never mind!
- THE KID: Sit on my lap...
- HARLOW: And touch your cock?
- THE KID: There's nobody here!
- HARLOW: Just like grownups, huh?
Why isn't blond hair on blue velvet enough?
- THE KID: Because you're a bag of meat!
- HARLOW: I'm an illusion.
What do you mean you'd want ME?
Why isn't blond hair on blue velvet enough?
- THE KID: Because you're a bag of meat!
- HARLOW: I'm a real BLONDE!
- THE KID: That's what I said.
- HARLOW: You wanted to see my baby pictures.
- THE KID: I believed it!
- HARLOW: Why do you want ME?
- THE KID: Because you're here!
- HARLOW: Fuck you!
- THE KID: That's the price you pay!
- HARLOW: What? What price?
- THE KID: The price for being here.
- HARLOW: Piss!
- THE KID: Piss on you!
- HARLOW: You ARE JEALOUS of my beauty!
- THE KID: We're DIVINE, Babe, divine!
- HARLOW: Well, what the Hell does that mean?
- THE KID: We're DIVINE, Babe, divine!
- HARLOW: Well, what the Hell does that mean?
- THE KID: We're HERE!
- HARLOW: If being HERE is divine it's a bunch of shit! Maybe I don't even like it here... looking at your crazy eyes, and buck teeth and long hair! And hearing all of that crap about blond hair and blue velvet! Besides you're an ugly fucker! You aren't even my type!
- THE KID: You wouldn't know divine from a handful of shit. You're here by accident!
- HARLOW: If you're divine it's a big mistake! If you're divine I'd rather be elsewhere!
- THE KID: Lying on a bed with a magazine?
- HARLOW: Yeah.

- THE KID: You'd be divine there too.
- HARLOW: You said I wouldn't know divine from a handful of shit!
- THE KID: You wouldn't know it but you'd be there!
- THE KID: You're a bag of meat!
- HARLOW: And what are you?
- THE KID: I am too—and something more!
- HARLOW: Like what?
- You wouldn't dare touch me!
- THE KID: I'd dare—but I wouldn't!
- HARLOW: YOU'RE SCARED!
- THE KID: Hmm!
- (KID grabs HARLOW and wrestles with her.)
- HARLOW: GOD DAMN YOU! LET LOOSE OF ME YOU DIRTY FUCKER!
- GOD DAMN YOU! OH! OH! GOD DAMN YOU!!
- (THE KID gets Harlow's shoes off and bites her foot. HARLOW screams.)
- (Gritting teeth.) Oh, you dirty fucker! You dirty God damn son of a bitch. . . . I think it's bleeding. (She holds up foot to look at it closely.)
- THE KID: (Turns his back on HARLOW. Goes and looks at the velvet walls.)
- HARLOW: YOU TORE MY STOCKING! YOU TORE MY STOCKING WITH YOUR TEETH! YOU TORE MY STOCKING WITH YOUR ROTTEN TEETH!
- THE KID: (Sneeringly.) Yeah, that's divine!
- HARLOW: (Nursing her foot.) Now you are being a cunt—with that silly sneer.
- Oh, my poor foot!
- You are a crazy bastard! Biting a woman's foot! Look what you did to my stocking!—I think there's some blood! Oh, my God, there's going to be blood!
- THE KID: Quit squeezing it.
- HARLOW: I'm going to be sick.
- THE KID: The Hell you are!
- HARLOW: Blood makes me sick.
- THE KID: Baloney!
- Quit squeezing it!
- HARLOW: Look at my stocking! Look at that tear!
- THE KID: Take your stockings off!
- HARLOW: (Squintingly.) No telling where you'd bite me then.
- THE KID: Come here and sit on my lap.
- HARLOW: You crazy, crazy bastard—I don't know why we have to be HERE!
- (Squeezing.) Oh,—my God,—there's blood!
- THE KID: Let me see!
- HARLOW: What are you, a fucking vampire? Get away from me! Get away you son of a bitch! Get away from me or I'll . . .
- THE KID: Scream?
- HARLOW: I wouldn't scream—I can take care of you.
- THE KID: Why wouldn't you scream? Because you want to be here?

- HARLOW: (*Squeezing.*) Fuck you!—Look there's some blood!
- THE KID: Where?
- HARLOW: Right by the toe. (*Pointing.*)
- THE KID: Do you like it?
- HARLOW: Are you kidding?
- THE KID: You squeezed it.
- HARLOW: My God, I can't stand blood.
- THE KID: You feel faint?
- HARLOW: You sadist!
- THE KID: Sit on my lap!
- HARLOW: You're crazier than a hoot owl. You threw me down and bit my foot like some fucking Jack the Ripper maniac!
- THE KID: You liked it.
- HARLOW: You're full of shit. (*Studies toe.*) Look at that! You like the blood. There, take a good look at it (*Stretching tear with her finger.*) Look at that—Where's my comb? (*Combs hair.*)
- THE KID: I like your breasts too.
- HARLOW: (*Sneeringly.*) It's about time you noticed them. That makes me very happy! I suppose you'd like to draw blood out of them too! I suppose you'd like to bite the nipples off—you sadist pervert!
- THE KID: You asked me to.
- HARLOW: To what—bite my tits off?
- THE KID: To put you in your place.
- HARLOW: I suppose biting a woman on the foot puts her in her place? You make me laugh! Look at that ruined stocking you fucking creep!
- THE KID: It looks good! I'm beginning to want you.
- HARLOW: Isn't that romantic (*Taking mirror.*) Get out of the light!
- THE KID: What do you see?
- HARLOW: If you'd get out of the light I'd see something besides your fucking shadow!
- THE KID: I like your breasts.
- HARLOW: So does everybody! (*Pause.*) Is everybody divine?
- THE KID: Before you can pry any secrets from me, you must first find the real me!
- HARLOW: Fuck off! (*Combing hair again.*)
(*Angrily:*) Look at that stocking!
- * * * * * *
- me real?
- THE KID: It makes me real—not you.
- HARLOW: We're both real—skip it. (*Taking stocking off.*)
- THE KID: Which one of you will I pursue.
- HARLOW: Fuck off!
- THE KID: Which one?
- HARLOW: There's only one me!
- THE KID: What?
- HARLOW: One me! There's only one ME!
- THE KID: Bull shit!
- HARLOW: Whataya mean?

THE KID: You convinced me otherwise.
HARLOW: Otherwise than what?
THE KID: That there's more than one you!
HARLOW: Jesus, that toe still hurts!
THE KID: Which one is divine?
HARLOW: Look at that tooth mark!
THE KID: Yeah. Which one is divine?
HARLOW: I'M DIVINE!
THE KID: Sure, I've heard that before.
HARLOW: I'm divine you son of a bitch—and you're divine too!
THE KID: Yeah!
HARLOW: And you're after my beauty!
THE KID: What beauty?
HARLOW: My blond beauty!
THE KID: I'm only after *my* beauty!
HARLOW: You're a weird fuck!
THE KID: We're in Heaven.
HARLOW: It's a Heaven full of tooth marks then!
THE KID: This IS HEAVEN!
HARLOW: You're only after my beauty!
THE KID: Take off your pants!
HARLOW: WHAT!
THE KID: Take off your pants!
HARLOW: Maybe I will! Maybe I just will to see what you do.
(HARLOW takes off her pants.)
THE KID: Hand them to me.
HARLOW: You're crazy!
THE KID: Hand them to me.
HARLOW: You're out of your nut!
(THE KID takes the panties from HARLOW who stands staring at him.)
Give them back you fucker!
THE KID: They're warm.
HARLOW: What did you expect—ice?
THE KID: And they're moist.
HARLOW: You expect sand? Now give them back!
THE KID: (He tears them in half.)
HARLOW: (Gasping with astonishment.) YOU'RE CRAZY!
(Picking up the pieces.) My poor panties.
My God, My God.
THE KID: Sit on my lap!
HARLOW: YOU'RE A FUCKING MANIAC! You're a raving drooling MURDERER!
THE KID: We're divine and we're flesh and blood and anything else is SHIT! IF WE DON'T DO WHAT WE WANT WE'RE NOT DIVINE! WHAT DO YOU WANT?
HARLOW: I don't know!
THE KID: What do you want?
HARLOW: My God, my clothes! Oh, my poor clothes!
THE KID: What do you want?

HARLOW: SHUT UP! SHUT UP! LOOK AT THESE FUCKING RAGS! YOU'VE BITTEN ME AND TORN UP MY CLOTHES! WHAT IN THE HELL IS HAPPENING. Where are we? Who the Hell are you? Who am I? Look at my fucking clothes . . . my clothes . . . And my God damn hair! Where's my comb? Why did you do that?

THE KID: I wanted to.

HARLOW: (*Shaking head and backing away.*) You're violent—and you're crazy!

THE KID: You don't need clothes in eternity except for decoration.—A toothmark goes away in Heaven or Hell. You don't need anything to perpetuate illusion. I don't want your beauty or any other—I only want to enact mine.

HARLOW: YOU'RE ALMOST BEAUTIFUL!

THE KID: Yeah.

HARLOW: You're too fucking dumb to talk but you're almost beautiful.

THE KID: It's like a vision . . .

HARLOW: That's a dumb word.

THE KID: What?

HARLOW: Vision—vision is a dumb word.

THE KID: What if I said you're as beautiful as a vision!

HARLOW: It sounds better then.

THE KID: Sit on my lap.

HARLOW: YOU'RE OUT OF YOUR MIND! Before you can pry any secrets out of me you must first find the real me!

THE KID: I already have!

HARLOW: Where?

THE KID: THERE! (*Points to panties on the floor.*)

HARLOW: You're full of shit. THAT'S NOT ME! That's a pair of torn panties!

THE KID: What's you then?

HARLOW: ME . . . HERE . . . ME . . .

THE KID: A BAG OF MEAT!

HARLOW: YEAH! A BAG OF MEAT!

THE KID: Swirling in eternity?

HARLOW: Yeah, swirling in eternity! Or solid HERE it doesn't make any difference!

THE KID: Is that what you want?

HARLOW: Yeah!

THE KID: Are you sure?

HARLOW: I planned it!

THE KID: What did you plan?

HARLOW: To be in eternity!

THE KID: How did you plan it?

HARLOW: By doing what I want!

THE KID: That's called destiny!

HARLOW: To do what you want?

THE KID: Yeah!

HARLOW: I guess you said it!

* * * * *

HARLOW: And touch your thing?

- THE KID: There's nobody here!
- HARLOW: Just like grownups, huh?
Why isn't blond hair on blue velvet enough?
- THE KID: Because you're a bag of meat!
- HARLOW: What do you mean you'd want ME?
Why isn't blond hair on blue velvet enough?
I'm a real blonde
- THE KID: That's what I said!
- HARLOW: (*Combing hair.*) You tore my panties up!
- THE KID: That's what I wanted.
- HARLOW: You're full of shit! If destiny is to tear a girl's panties up
—then you're full of it!
Look at those poor rags.
- THE KID: Yeah.
- HARLOW: Look at 'em!
- THE KID: Sure.
- HARLOW: You tore my panties up!
- THE KID: Yeah!
- HARLOW: You tore them in half—and bit me on the toe—and threw
me on the floor—and ruined my stocking!
- THE KID: You ruined your stocking.
- HARLOW: You bit my fucking toe! AND TORE MY PANTIES UP!
- THE KID: That's what you said!
- HARLOW: BULL SHIT!
- THE KID: That's what you said!
Before you can pry any secrets out of me, you must first
find the real me! Which one will you pursue?
- HARLOW: Fuck off! (*Combs hair energetically.*)
That's a shitty destiny!
- THE KID: It's only a step.
- HARLOW: How can it be a step without being destiny?
- THE KID: Who knows?
- HARLOW: Yeah?
- THE KID: Yeah.
- HARLOW: You fucking rat! I'm disheveled.
- THE KID: Good.
- HARLOW: I'm disheveled!
- THE KID: In eternity.
—You look good!
- HARLOW: Yeah, I'm disheveled in eternity—and that's destiny . . .
- THE KID: It doesn't matter! You're here and you look good!
- HARLOW: Where?
- THE KID: HERE!—And you look good!
- HARLOW: You said that and I'm tired of hearing it!
- THE KID: YOU LOOK GOOD!
- HARLOW: In eternity?
- THE KID: Yeah!
- HARLOW: Well, I don't like it!
—You're DUMB!
- THE KID: It doesn't matter!
- HARLOW: I'm sick of hearing you say it doesn't matter!

THE KID: So what! We're here. It doesn't matter whether it matters—there's nobody around to watch!

HARLOW: You're almost beautiful—you're so fucking dumb.

THE KID: It doesn't matter!

HARLOW: Awh shit!

There's nothing here but blond hair and blue velvet.

THE KID: And a lot more.

HARLOW: MORE WHAT?

THE KID: It hasn't happened.—Sit on my lap.

HARLOW: *And lick your boots?*

THE KID: (No,) skip that.

HARLOW: Skip it, huh?

THE KID: Yeah, skip it. Sit on my lap.

HARLOW: You're a maniac! What if I don't? What'll you do—tear my dress up?—Or kick my head?

THE KID: I might.

HARLOW: You might, huh?

YOU WOULDN'T DARE!

THE KID: That's what you said before.

HARLOW: O.K., I said it before.

THE KID: What?

HARLOW: Whatever I said. Whatever I said, I said before.

THE KID: That's right. (yeah)

HARLOW: You monomaniac!—You're so fucking dumb you make me puke! You're so screwed up you might do anything.

THE KID: That's right.

HARLOW: YOU'RE DUMB!

THE KID: You're beautiful!

HARLOW: YOU'RE DUMB! DUMB! DUMB!

THE KID: Does it matter?

HARLOW: (*Pause.*) I DON'T KNOW.

THE KID: Don't know what?

HARLOW: Does it matter?

THE KID: Yeah.

HARLOW: You said nothing MATTERS!

THE KID: It matters to ME.

(*Pause.*)

HARLOW: Why don't you want me to lick your boots?

THE KID: I changed my mind!

HARLOW: In eternity?

THE KID: Sit on my lap.

HARLOW: And lick your boots?

THE KID: We're divine and we're flesh and blood and anything else is shit! IF WE DON'T DO WHAT WE WANT—WE'RE NOT DIVINE! What do you want?

HARLOW: I don't know.

—You dumb cunt!

(*Looking.*) Where are my shoes?

THE KID: I'll put them on your feet.

HARLOW: The fuck you will!

Get out of my way.

THE KID: Where would you go?
HARLOW: I'll stay right here.
THE KID: In eternity?
HARLOW: Yeah. (*Finds shoes.*)
THE KID: Is that what you want?
HARLOW: Yeah, I'm going to stay right here!
THE KID: There's nobody here to watch!
HARLOW: (*Starts to put on shoe.*)
THE KID: Don't put them on!
HARLOW: Why not!
THE KID: We're divine, Babe, divine!
HARLOW: Maybe I won't—I like the look on your face. I like to see you be a cunt! (*Stretches her legs out—arching her feet.*)
THE KID: What do you want?
HARLOW: (*Mocking.*) Well, what do you want?—Or maybe I shouldn't ask—I already know!
THE KID: How do you know?
HARLOW: I heard what you said. You say it over and over till it makes me puke!
Where's my comb?
THE KID: Look yourself!
It's on the table under your shoes.
HARLOW: I know that—I just like to hear you talk!
THE KID: Yeah!
What do you want?
HARLOW: What if I said—"whatever you want"?!
THE KID: You're full of shit!
HARLOW: GOD DAMN YOU, I'M SICK OF THIS!
THE KID: Shut up, and sit on my lap!
HARLOW: What does it matter if I do or don't?
THE KID: It matters in eternity!
HARLOW: Like being a bag of meat matters!
THE KID: Yeah.
HARLOW: What are we doing here?
THE KID: It matters but I don't give a shit!
HARLOW: You mean we're HERE!
THE KID: Yeah.
HARLOW: What'll we do?
THE KID: WHAT I WANT!
HARLOW: WHAT ABOUT ME?
THE KID: Whatever you want!
HARLOW: Yeah!
You're a dumb fuck!
THE KID: And you're a bag of meat!
HARLOW: And nothing more?
THE KID: Where we are—only the bag of meat matters.
HARLOW: Because there's nobody around to watch?
THE KID: Yeah.
HARLOW: And you tore my panties up.
THE KID: Yes.
HARLOW: And you bit me on the toe!
THE KID: Yeah.

HARLOW: And you threw me down on the floor!

THE KID: Yeah.

HARLOW: And you might do anything you want!

THE KID: Sure.

HARLOW: And what about me?

THE KID: That's up to you.

HARLOW: What if I sit on your lap?

THE KID: You called me a cunt!

HARLOW: YEAH, WITH YOUR HAIR HANGING DOWN TO YOUR ASS AND BUCK TEETH!

THE KID: What does it matter?

HARLOW: IT MATTERS PLENTY, YOU FUCKING SHIT! (*In fury.*) WHAT IF I SIT ON YOUR LAP!

THE KID: Try it and see!

HARLOW: I wouldn't touch you with a dirty stick! (*Pause.*) What if I did sit on your lap?

THE KID: Try it and see.

HARLOW: DON'T GET NEAR ME!!

THE KID: I didn't move.

HARLOW: You're full of it, buddy! Look at my pants! (*Holding them up.*)

THE KID: So what!

HARLOW: Stay right where you are!

THE KID: Shut up! (*Not moving.*)

HARLOW: What do you want?

THE KID: Whatever I say I want!

HARLOW: You said you wanted me to lick your boots!

THE KID: O.K., do what you want.

HARLOW: And now you don't.

THE KID: Sit on my lap!

HARLOW: WHAT IF I WALK OVER AND SIT ON YOUR LAP?

THE KID: Yeah.

HARLOW: What if I do?

THE KID: Try it and see.

HARLOW: What would you do?

THE KID: How would I know?

—Can't you guess?

HARLOW: What do you want me to do?

THE KID: I already said.

HARLOW: Rub your joint?

THE KID: Yeah. That's a place to start.

HARLOW: (*Hurls panties at him.*) THERE'S A START!

THE KID: We're already HERE. We don't need a start.

HARLOW: Yeah, that's what YOU said!

THE KID: We've started.

HARLOW: Oh yeah! Fuck you!

THE KID: What do you want?

HARLOW: To look at the walls. (*She walks stroking the walls.*) (*THE KID takes out handkerchief and polishes toes of his boots.*)

WHAT IF I SAID YOU'RE NOT A CUNT?

- THE KID: So what! (*Polishing.*)
HARLOW: WHAT IF I SAID YOU'RE NOT A CUNT?
THE KID: So what!
HARLOW: I've got to use words!
THE KID: Oh yeah!
HARLOW: WHAT DO YOU WANT? What the goddamn Hell do you want?
THE KID: I want whatever I want!
HARLOW: I've got to use words!
THE KID: Oh yeah!
HARLOW: I like you. (*Suddenly.*)
You're insane and violent but I like you!
THE KID: So what!
HARLOW: I've got to use words!
THE KID: Oh yeah!
HARLOW: What do you want.
THE KID: I want whatever I want!
HARLOW: Well?
THE KID: Whatever I want!
HARLOW: Well WHAT do you want?
THE KID: Maybe I want to be beautiful!
HARLOW: Awh! WHAT DO YOU WANT?
THE KID: Before you can pry any secrets from me, you must first find the real me! Which one will you pursue?
HARLOW: What makes you think I want to pry secrets from YOU?
THE KID: Because Im so beautiful.
HARLOW: So what!
THE KID: You want to be as beautiful as I am.
HARLOW: Oh yeah!
THE KID: Before you can pry any secrets from me, you must first find the real me! Which one will you pursue?
HARLOW: (*Coming closer.*) What makes you think I want to pry any secrets from you?
THE KID: Because I'm so beautiful.
HARLOW: So what!
THE KID: You want to be as beautiful as I am!
HARLOW: Oh yeah! (*Kneels quickly and grabs his boots.*) I'VE GOT YOU! YOU'RE BEAUTIFUL!
THE KID: It's an illusion! (*HARLOW hugs the boots and caresses them.*)
HARLOW: There are rainbows on them—rainbows reflected on sheer black! (*KID reaches over and takes Harlow's head.*)
THE KID: Now I've got your blond hair in my hands.
HARLOW: There are rainbows on them—rainbows reflected on sheer black!
THE KID: Now I've got your blond hair in my hands!
HARLOW: There are rainbows on them—rainbows reflected on sheer black!
THE KID: Now I've got your blond hair in my hands.
HARLOW: (*Looking up at KID.*) You've got blond hair in your hands. There's nobody around to watch! You tore my panties up and you bit my toe!
THE KID: Yeah.

HARLOW : There's nobody around to watch.

THE KID : No, there's not.

HARLOW : What'll we do ?

THE KID *pulls HARLOW up into his lap.*

THE KID : (*Looking into Harlow's eyes.*) Now I've got your blond hair in my hands.

HARLOW : And we're all alone !

HARLOW *SITTING ON Kid's lap with one arm around his neck—he kisses her on the shoulder and neck—she strokes his cock . . .*

HARLOW : My God, we're really here !

They begin to twist in the chair—THE KID slips gradually to the floor at Harlow's feet.

HARLOW : And we're all alone !

Kneeling THE KID takes Harlow's foot in his hands and kisses it. He kisses the other foot. He presses his head against her thighs and holds it there. His hands clutch her bare feet behind his back. He lets loose of her feet pressing his head more tightly against her thighs. She arches her back. He grasps her feet again burying his head in her thighs. He raises his head as if to speak and drops it to her thighs again. He lets loose of her feet and grasps them again. He lets loose of her feet and reaches up and moves her dress up her thighs. He clutches her feet behind him again. He grasps her thighs and presses his face between them, kissing her. HARLOW stiffens and arches her body . . .

(*Ecstatically.*) STAR! STAR! STAR! OH MY GOD—!
 STAR! STAR! STAR! STAR! STAR! OH MY GOD—!
 STAR! STAR! YOU'RE NEXT! OH MY GOD—! BLUE-
 BLACK STAR! STAR! STAR! STAR! STAR! STAR!
 STAR! STAR! STAR! STAR! STAR! STAR! STAR!
 STAR! STAR! STAR! STAR! STAR!



THREE PICTURES TAKEN BY SAN FRANCISCO POLICE
DURING CLIMAX OF *THE BEARD* PERFORMANCE
IN THAT CITY







EXCERPTS FROM *THE DUTCHMAN*, A PLAY PRESENTED AT CALIFORNIA STATE COLLEGE AT FULLERTON

In response to a request and subpoena from the committee, the administration of the Fullerton State College furnished scripts as presented of several plays performed on the campus, one of which was *The Dutchman* by LeRoi Jones.

Principal characters in the play are Clay, a 20-year-old Negro, and Lula, a 30-year-old white woman, and the play deals in general with the efforts of the white woman to seduce the Negro.

The following are quotations from various parts of the play based on pages as numbered by the committee staff.

Page 4. Lula: "I was. But only after I'd turned around and saw you staring through the window down in the vicinity of my ass and legs."

Page 5. Lula: "You think I want to pick you up, get you to take me somewhere and screw me, Huh?"

Page 6. Stage direction to Lula: (Putting her hand on Clay's closest knee, drawing it from the knee up to the thigh's hinge, then removing it, watching his face very closely, and continuing to laugh . . .)

Page 9. Stage direction to Lula: (Grabs his thigh, up near the crotch)

Clay: "Watch it now, you're gonna excite me for real."

Page 11. Lula: ". . . And most of all yea yea for you, Clay Clay . . . My Christ. My Christ."

Page 12. Lula: "You know goddam well what I mean."

Page 15. Lula: "One of the things we do while we talk. And screw."

Page 17. Stage direction to Lula: "Each time she runs into a person, she lets out a very vicious piece of profanity, wiggling and stepping all of the time."

Lula: "Yes. Son of a bitch, get out of the way. . . . Ten little niggers sitting on a limb. . . . Yes. Come on, Clay. Let's do the Nasty. Rub bellies. Rub bellies."

Lula: "Come on, Clay. Let's rub bellies on the train. The Nasty. The Nasty. Do the gritty grind, . . . Grind till you lose your mind. Shake it, shake it, shake it, shake it."

Page 18. Lula: "Come on, Clay . . . let's do the thing. Uhh! Uhh! Clay! Clay! You middle-class black bastard. . . . you would be Christian. You ain't no nigger . . ."

Lula: "Gravy snot whistling like sea birds . . ."

Lula: "Screw yourself, Uncle Tom. Thomas Wooly-Head . . ."

Page 19. Clay: "Lula . . . you dumb bitch."

Lula: "Let me go! You black son-of-a-bitch."

Clay: "Shit, you don't have any sense, Lula."

Page 20. Clay: "I'll rip your lousy breasts off! . . . You great liberated whore! You fuck some black man, and right away you're an expert on black people. What a lotta shit that is. The only thing you

know is that you come if he bangs you hard enough. And that's all. The belly rub? You wanted to do the belly rub? Shit, you don't even know how. You don't know how. That ol' dipty-dip shit you do, rolling your ass like an elephant. That's not my kind of belly rub. . . . And don't even understand that Bessie Smith is saying, 'Kiss my ass, kiss my black unruly ass.' Before love, suffering, desire, anything you can explain, she's saying, and very plainly, 'Kiss my black ass.' And if you don't know that, it's you that's doing the kissing. . . . 'Up your ass, feeble minded ofay! Up your ass.' . . . (Page 21) Clay continued: "Just let me bleed you, you loud whore . . . Ahhh. Shit. But who needs it? . . . And on that day as sure as shit, when you really believe . . . etc."

Information has come to the committee to the effect that this play was also produced in the class of Prof. Duerr and directed by Terry Gordon.

EXCERPTS FROM THE *FREE PRESS*, A NEWSPAPER REGULARLY SOLD ON THE CAMPUS OF THE CALIFORNIA STATE COLLEGE AT FULLERTON

The following are quotations taken from the *Los Angeles Free Press*. This paper was purchased on the campus of Cal-State Fullerton in the patio area where vending machines are located. Also sold at this location is the *Christian Science Monitor*. They are sold from regular newsstands.

ARTICLES

"Clinical observations of women masturbating indicate that concentrating on the clitoris alone during sexual foreplay may be too much of a good thing. During automanipulation women stimulate the entire mons area, and if they stimulate the clitoris directly, they give their favors to the shaft rather than the glans.

"To be blunt, a thigh, knee or heel of the hand may be better appreciated than a digit." (From "Hippocrates" by Eugene Schoenfeld, M.D., a question-answer column.)

"WILLIAMS: Ah bullshit."

"WILLIAMS: I don't care either. So fuck it."

"WILLIAMS: Hell no, I've been on this fuckin' publicity tour for two months, and I haven't been sober one day for two months. Every day, they take me on some radio or TV program—the same bullshit over and over again. I used to drink with Brendan Behan a lot, and one time, he asked me, "Have you ever been to fuckin' America?" and I said no, and he said, "Don't go."

"WILLIAMS: Hell yes! God! When I published my third book in London, I told 'em, 'Look, everybody else gets a cocktail party. Why don't I get a cocktail party? I want a cocktail party! All those attractive young widows that adore young writers . . . Bring all those widows! I'll fuck the ass off them!'"

"If ye're going to change a country . . . Lenin knew how. And he stood like like a rock and said, "We will not back down . . ." He was a great man."

"The English and the Russians don't give a good fuck whether they're liked or not."

" . . . if they (hippies) are really where they say they are . . . they would open a house, or whatever you care to call it, a house where women would give love—yes, literally give love—to all the sick bastards that run this fuckin' society. The generals. All the sick, fascist businessmen, the cops, all the perverted, castrated, middleclass bastards." (From an interview with Gordon Williams conducted by Paul Eberle.)

"All the crap about stay in school, try real hard, be good citizens, don't get bad discharges from the service, none of that shit works for black men."

“This is 1968. Something has to give. Something will give. And as Malcolm X once said . . . I’m talking to YOU, WHITE MAN!!” (From “Negro Won’t Help Racists Strike at *Herald-Examiner*” by Hakim A. Jamal, cousin of Malcolm X.)

UNCLASSIFIED ADS

“I’M A TIT MAN want busty gal any age or race, Phone # if poss. Ans. all. Walt G. POB 1142 Downey, Calif.”

“Very discreet male will satisfy lady with unusual sex desires. All letters answered C. F. Leonard 704 NO Hobart Blvd. L.A. 90029”

“Young nice gay queen 21 seeks same, any age. A. C. Box 3362 Huntington Park Calif. 90255”

“Nice looking guy 34 wants to be used by fem good body any age. Wilder the better. You name it. I will do two at once. Ferrell 6290 Sunset Suits 414, Box 32. Tel. # and photo if poss.”

“Male sadist, white, 28, attractive, single and sincere desires masochistic female 21 to 30, Caucasian or Oriental, and single for sex and companionship. Write: Paul Duncan, 5819 Gregory Ave. Apt. 7 Hollywood.”

(All these quotes were taken from the Los Angeles Free Press, Vol. 5, #1 (Issue #181) Jan. 5-11, 1968 issue.)

Two pictures introduced as proof of sale of the Free Press on the campus of California State College at Fullerton.





TRANSCRIPT OF TESTIMONY AT COMMITTEE HEARING

INDEX

<i>Witnesses</i>	<i>Page</i>	<i>Witnesses</i>	<i>Page</i>
William Drake	48	Dr. Stuart Silvers	117
Charles L. Ford	51	Robert Grant	120
Dr. Glenn S. Dumke	57	Jane Arthur	121
Dr. W. Van Willis	66	Frances Wood	123
Dr. Roger Dittman	67	Dr. Paulina Salz	122
Randy Smith	72, 87	Dr. Miles McCarthy	128
Eric Bass	74	Dr. David Malone	131
J. William Goff	75	James Clancy	135
Wayne Devorak	77	Dr. George Forest	138
Marion Stanek	82, 108	Leland Launer	144
James Brock	88	Dr. William B. Langsdorf	148
Dr. William C. Langsford	91	Dr. Edwin Duerr	164
Mr. Duerr	92	Nick Chilton	141
Terry Gordon	109	Olie K. Nash	145
Dr. James Young	112	Henry S. Samuels	147
Paul Stilwell	116		

Senator Richardson: Mr. Chairman?

The Chairman: Senator Richardson.

Senator Richardson: I'd like to also make it clear, which you and I talked about, Mr. Chairman, during the testimony of any witness it is the habit and part of the Senate procedure that we may ask questions at any time during the testimony. Many times this has disturbed people because they feel it's a tendency to interrupt, but it really isn't. It's part of the policy of finding out information. So on occasion, you will find a member of the committee will stop a person during his testimony to ask questions. I think this should be made clear and understood by the audience.

The Chairman: Thank you, Senator Richardson. Any other comments from the members of the committee? If not, the first witness will be Mr. William Drake, editor of the Yorba Linda *Star*—Mr. William Drake.

Will you give your name, Mr. Drake?

Mr. Drake: William Drake, the Yorba Linda *Star*.

The Chairman: Would you care to tell us generally what you saw when you witnessed the production of *The Beard* at the Fullerton College campus?

Mr. Drake: We attended the play on the second night, the first performance of the second night.

The Chairman: Mr. Drake, if you'll pardon me, I was thinking that since you are a voluntary witness that it would not be necessary to swear you in, but I have been reminded by some of the members that it would be a good idea. So will you stand and raise your right hand please:

WILLIAM DRAKE,

called as a witness, and having been first duly sworn by the chairman, testified as follows:

EXAMINATION

By the Chairman: Q. Proceed.

A. We went to the first performance of the second night, and we were actually shocked by what we saw.

Q. Will you tell us just what you did see?

A. We witnessed the entire play—the dirty four-letter words, and with the final conclusion of the oral sex act. And we were, of course, very disappointed that we had witnessed this thing in a tax-supported school. This is our entire point, running a review and commenting editorially on it.

By Senator Schmitz: Q. Mr. Drake, are you familiar with the printed version of the play, *The Beard*, by Michael McClure, which I have in my hand?

A. I am.

Q. Have you read this book?

A. I have.

Q. Did the play that you saw given at Cal State Fullerton essentially the same or could you tell us in what way it differed from the script that I have here in my hand?

A. I couldn't tell any difference.

By Senator Kennick: Q. Mr. Drake, did you say you witnessed an abnormal sex act at the play?

A. I witnessed the sex act as presented in the play.

Q. Were they not simulated?

A. They could be and they could not be.

Q. You don't know whether it was an actual sex act or not?

A. No.

Q. Thank you.

By The Chairman: Q. About how far were you from the stage, Mr. Drake?

A. I would say approximately 40 to 50 feet.

By Senator Richardson: Q. Would you describe the physical setting of the play? Was the actor's back to you during this period? What was the physical arrangement?

A. Of the two participants?

Q. Of the two participants, yes.

A. The stage was directly to our front, and there was a chair on one side of the stage and a chair on the other, with a table in between, and in the final act, the two participants were in the one chair which was directly to our front.

Q. Well, the reason I ask this question is—

Senator Richardson: May I read this into the record? This is what has been presented to us, and I want to get this into the record.

"The girl had a slit in the right side of her dress, almost to the waist. When she walked one leg was completely exposed. The girl sat diagonally on a chair—the man kissed her feet and then continued kissing her legs—"

By Senator Richardson: Q. Was that simulated or was that the impression given to the audience?

A. That was not simulated.

By The Chairman: Q. Was that what happened in fact?

A. Yes.

Senator Richardson: It says, "—moving upward, and went absolutely as far as he could go."

"Her body was moving, etc., and she was making quite a bit of moaning noises," it states here. And indicated possible sexual enjoyment and eventually the achievement of sexual climax, etc.—boy, this is rough stuff to read.

By Senator Richardson: Q. Is this actually what transpired?

A. Yes.

Q. Or was this the impression given?

A. Yes.

Q. Thank you very much.

The Chairman: If there are no other questions from members of the committee, I'd like to ask—

By The Chairman: Q. What was the farthest distance, in your opinion, that the man's mouth would have been from the pubic part?

A. Well, it would be a very small distance.

By Senator Kennick: Q. How far?

A. Two or three inches at the most, I would say.

By The Chairman: Q. During the play, did she expose her body by walking around with this dress with the slit?

A. Well, naturally, the body was exposed through this slit; in fact, the stockings and panties were clearly visible.

Q. Did she remove these during the course of the performance?

A. Yes.

Q. And during the act that we were just talking about, did it appear to you that she had no undergarments on?

A. That's right.

Q. Were the pants and stockings clearly visible on the floor during the act we are speaking of?

A. Yes, they were.

Q. Did the scene continue for two or three minutes, would you say?

A. I would estimate that time, yes.

Q. And would you say that all that was visible were the ears and the back of his head and the motions of his head, moving with her body?

A. From our position, that's all I could see, yes.

Q. Would you say she indicated sexual gratification?

A. Yes.

Q. In connection with the advertising of the play, did you observe a placard on an easel outside the door of the theater advertising it?

A. Yes, there was.

The Chairman: Any other questions from any members of the committee?

By Senator Richardson: Q. Mr. Drake, it states here on your background that you have been in the newspaper business for approximately 40 years; is that correct?

A. Right.

Q. One thing I know about newspaper industry, about the press, is that they have the opportunity to see a great deal of cross section of what we call life in this country. Would you say that that would be a fair statement?

A. I would say so.

Q. Have you ever seen anything comparable to this in your background of the theater or anything?

A. Never.

Q. Thank you.

The Chairman: Any further questions? There are no further questions, Mr. Drake. We will excuse you for the moment. Would you continue to make yourself available during the balance of the day in the event we want to ask you further questions.

The committee has been requested by the college to call witnesses as far as possible in a certain order which we have been given. Unfortunately, the eyewitnesses that were requested, which is the testimony we are trying to get in now, eyewitnesses of the performance—some of these are not the very first ones requested by the college. So I would like to call an eyewitness requested by the college, Mr. Charles Leonard Ford.

CHARLES L. FORD,

called as a witness, and having been first duly sworn by the chairman, testified as follows:

The Chairman: What does your testimony consist of? Do you have a presentation to make?

The Witness: No, I attended the first performance of *The Beard*. It was a closed performance—the invitation was from Harry Gordon, the director, who was a former student of mine.

That's all I care to say.

EXAMINATION

By The Chairman: Q. About how many people were in the audience?

A. A hundred plus.

Q. Was your impression of the program substantially that that has been presented by the previous witness?

A. I saw things differently as far as costume was concerned.

Q. Would you like to tell us what you saw as far as the costume was concerned?

A. The actress in the show wore a dress that came down below her calf. There was an opening on the right side that was just above the knee, barely. As part of the play, she removed a pair of pants; she removed her hose. There was never any exposure that I saw of the actress.

Q. Of the what?

A. I never saw any exposure of the body, which has been described previously here, from where I was sitting in the first row.

Q. You were sitting in the first row?

A. Yes.

Q. Did she have another pair of pants underneath the ones she took off?

A. I assume she did.

Q. I'm asking you to swear under oath whether she did or not. Did she or did she not have on another pair of pants?

A. I could not see if she had another pair of pants on. She was not exposed at any time where I sat.

By Senator Schmitz: Q. Mr. Ford, are you familiar with the printed version of the play, *The Beard*, I have in my hand here?

A. Yes, I am.

Q. Is the play that you saw basically similar or essentially the same as this one? If not, could you tell me how it differs?

A. I think the show I saw is essentially the same as that script.

Q. I hate to read this, but I would like to read the last paragraph and just ask you if this is basically what happened here.

This is the stage direction—"kneeling—the kid takes Harlow's foot in his hand and kisses it. He kisses the other foot and he presses his head against her thighs and holds it there. His hand clutch her bare feet behind his back. He lets loose, depressing his head more tightly against her thighs. She arches her back. He grabs her feet again, burying his head in her thighs. He raises his head as if to speak and drops it to her thighs again. He lets loose of her feet and grasps them again. He reaches

up and moves her dress up her thighs, and clutches her feet behind him again. He grasps her thighs and pressed with his face between them, kissing her. Harlow stiffens and arches her body and then ecstatically—' and so forth.

Is that basically what you saw—which are the stage directions in the printed version?

A. The dress was never raised above her knees more than three or four inches more than the opening at the thigh which I have previously mentioned. Otherwise, I would say essentially the same.

By Senator Richardson: Q. Was his head between her legs?

A. This is a very tight dress of the thirties, such as Jean Harlow might have worn, so there can be little indentation in this sort of garment.

Q. Was his head between her legs?

A. I don't know how he —

Q. You must know whether he had his head between her legs or not.

A. There was clothing between her legs.

Q. In other words, his head was not between her legs, clothing was between her legs?

A. Yes.

Q. May I have your name again?

A. Charles Leonard Ford.

Q. I cannot find on the material we have here any background data. Would you like to give me a little bit of your background, who you work for—

A. For the past two and 18 years, I have been head of the drama department of Santa Ana College, Santa Ana, California. I have taught drama there for the last 12 years.

Q. Dr. Ford—or Mr.—?

A. Mr.

Q. Mr. Ford, have you ever put on this program in Santa Ana College?

A. No.

Q. Did you ever intend to put it on?

A. No.

Q. Why not?

A. Number one, I'm not directing plays anymore. I'm teaching academic work in the classroom, but I'm not directing.

It is not a play that I think is suitable for a junior college.

Q. But you do believe it's suitable for a four-year college?

A. I think the play might be suitable for experimental work—not for a public performance but—

By Senator Walsh: Q. Experimental work in what field?

A. In studying playwriting, what the trends in playwriting are.

Q. Do you think this is a contribution to the moral attitudes of the students, which the taxpayers of the State of California are paying for?

A. No, I don't think it's immoral however.

By the Chairman: Q. Senator Richardson has another question, but while we're on the point—did you find the language in the play at all offensive to you?

A. I was shocked when I heard the words, all of them the first time on the stage, which I think most people in the audience were. After you hear a word used enough times, I think the shock value wears off.

Q. In your present state of mind, are the words in the play offensive to you?

A. They're not words that I use in my conversation.

Q. In your present state of mind, Mr. Ford, are the words in the play offensive to you?

A. I don't know.

Q. Thank you.

By Senator Kennick: Q. From your point of view, what is accomplished by the production of the play? You say it has some value. I'm a novice. This is your profession—what value?

A. Would you rephrase or restate your question again?

Q. Well, you stated that it has some value for some reason—I've forgotten—research in playwriting; is that it? I read this play and ask myself after I finish, "Why? What for?"

Everything in life has got to have some sense to it, so would you tell me, if you can, what the reason is?

A. Well, the play is really not much different than many other plays that are on the public market at this point. I think some of the four-letter words that Senator Whetmore referred to——

Q. Well can we distinguish between the public market and a tax-supported campus before we start?

A. I don't think there is a difference, Senator. It seems to me that the college is also part of the public. It's part of the world.

Q. There's no doubt about that. We all agree to that point. But I think there is a difference. If I desire to pay my money for a public performance of any kind, it's my money. And if the people who want to produce it spend their own capital to produce it—but there is a difference when the people—you know, we spend a great deal of our time in Sacramento attempting to finance higher education in the state.

A. I'm very aware of that.

Q. Those of us with some responsibility, view with great alarm the trend to back up in this field. It is our desire to keep higher education on the highest possible plane with all of the finance that we can possibly give it, and it's not an easy task.

It's my off-the-cuff opinion is that this is somewhat of a ridiculous expenditure of taxpayers' money unless you can tell me why. What is the value of this play?

A. It represents, as I mentioned earlier, I think, a very definite trend I think is what is happening in literature. As such, we can't pretend that it does not exist.

Q. There's lots of things in this life that exist that you don't do on a campus.

A. I agree.

Q. That's a cinch. I can think of some very sordid things that are perfectly human.

A. This was done as a classroom experiment worked out by a group of people in the classroom—mutually agreed. It was not done as a public performance.

Q. Members of the public were there, were they not?

A. Ones that had been invited by class members and faculty members at the college.

Q. Then did you have somewhat of a mixed audience to a greater or lesser degree?

A. Yes.

Q. Would you produce this play if you were in a four-year college?

A. No.

Q. Why?

A. Because I personally don't think the play has this much literary merit.

Q. Do you think it has any literary merit?

A. Perhaps as a personal catharsis for the writer.

Q. Are we to sacrifice society for the writer?

A. No, but he is a member of society.

Q. That's all.

The Chairman: I think Senator Schmitz first—I have one question for my records up here——

By The Chairman: Q. Did you by any chance witness a performance of *The Dutchman* at Fullerton?

A. No.

By Senator Schmitz: Q. Mr. Ford, you have taught drama at Santa Ana College and directed plays?

A. Yes, I have.

Q. After reading this, my own impression was that there was some people that I know would like to put it on and some people I know that would like to see it, but one thing that struck me as strange is that there are only two actors in the play—or one actor and one actress—and one director, and then I suppose a few stagehands, and it almost seems to me that you couldn't have fewer actors or there are very few plays that fewer people would be getting educational value out of. Do you ever remember in your history a play being put on with only two actors or two actresses for educational value? In other words, my point is: What educational value—to me, drama class is to teach people who to act or how to direct or to be stage hands, and therefore, when you spend the time to put a play on, it seems to me that the maximum should get the benefit out of it. But are you aware of any plays—first of all, I assume these people were students?

A. Yes.

Q. They were not imported actors or actresses?

A. No. They were students as far as I know.

Q. They were students and the director was a student. From your recollection, do you remember directing any play that had as few as two actors?

A. Yes, one act, which this is.

Q. This is not uncommon for a play——

A. No, it's not uncommon I don't think for short plays. There are numerous long plays, but most of the time, a full-length play with two

actors is not very frequently done at an educational institution, but one-act plays, many of them are.

Senator Walsh: That's one of the things I'd like to find out.

By Senator Walsh: **Q.** I would like to bring out for the record, was this definitely a nonimported student—these were members of Fullerton College that were in this particular play?

Senator Schmitz: Senator Whetmore just informed me that he has information that indicates that the actress and the actor were not enrolled in the college.

By Senator Schmitz: **Q.** Of course, that's not up to you to determine.

A. That's not my province, no.

By Senator Richardson: **Q.** Mr. Ford, what was would you say the average age of the group that witnessed this performance?

A. Well, it's very difficult to tell. I'm sure there were people there older than I which would put them in their late forties, fifties,—there were probably people older than that.

Q. Were they other members of professional communities, other teachers such as yourself who were there to witness this?

A. I really don't know if there were others outside of Cal State there. I didn't check. I arrived near curtain time and I saw the show. There were other instructors there. There were students there—probably juniors and seniors, I would suspect—or guests at Cal State Fullerton.

Q. Is it possible that there were any freshmen there?

A. Well, not that I know of, but it's very difficult to tell a freshman from a senior just by looks, and I don't know.

Q. Do you believe that this particular play contributed anything to the educational processes of this college? You are a drama teacher, so, obviously, you must have some opinion on it.

A. I do.

The Chairman: If there are no further questions—

Senator Richardson: I'd like to have an answer.

The Chairman: I'm sorry.

The Witness: It gave a directing student an opportunity to direct material. In that sense, it was certainly educational.

By Senator Richardson: **Q.** In other words, you believe that this did contribute to the educational processes of the college?

A. In that manner, yes.

Q. Do you think this kind of play put on at a state college campus adds, let's say, to the image of the school to the general public?

A. Not particularly.

Q. Do you think it's destructive and harmful to the school?

A. It has been, I think.

Q. In your opinion, do you think it would be harmful? Is that one of the reasons why you say you would not put it on if you had the opportunity to do so?

A. I would not put the play on if I had the opportunity because I, personally, don't want to direct this play. I don't want to direct this sort of show.

By Senator Walsh: Q. You brought out one point here about people who were in the audience, and am I incorrect in assuming through testimony that I have read here that there were tickets printed for this show?

A. I was given a handwritten ticket.

Q. It wasn't a printed ticket in the form of a theater ticket?

A. No, sir, I was given a slip of paper.

Q. Did you see any tickets that would represent a public invitation such as a theater ticket?

A. No.

By Senator Richardson: Q. Did you see a simulated act of oral copulation?

A. I saw the actor's head in the lap, resting face down, of the actress, on her dress.

Q. Did it project the image of oral copulation?

A. This could project the image of a simulation of an act.

Q. Of oral copulation?

A. Right.

Senator Schmitz: I think that basically was the question I was going to ask.

By Senator Schmitz: Q. Being familiar with the stage, there's a stage kiss in which they don't really kiss, but it is to portray to the audience that they are kissing. In this case, do you feel after reading the play and seeing it that they were—the idea of the act, whether it was simulated or not, was to portray to the audience that an act of oral copulation was taking place?

A. I think that was the playwright's intent, and therefore, the director's intent in the performance I saw.

By Senator Richardson: Q. Does this intent project itself to you?

A. Yes.

Q. Well? Was it done well or was it a poor performance?

A. Not particularly.

The Chairman: If I may hold you just a moment, we have a representative of the Senate Education Committee here. The chairman of the Senate Education Committee is Senator Albert Rodda who was unable to attend because he's heavily engaged in legislative business in Sacramento. He has sent a consultant from the committee, the Senate Education Committee, and we have agreed that he may participate with us in our discussions because certainly any legislation that is proposed, if anything is proposed, would go through the Senate Education Committee. So the consultant has advised me that he has a question, and I would like, with the indulgence of the members of the committee—if it's agreeable with the rest of you—allow him to ask a question. Dr. Lowery—

By Dr. Lowery: Q. Mr. Ford, did you say you attended the first night's performance?

A. Yes.

Q. As I understand it, there was some type of panel of psychology, philosophy and the drama department active in this.

A. Yes.

Q. Would you comment on what they discussed, what occurred?

A. Unfortunately, I felt they discussed very little.

Q. Very little what?

A. Well, I assume as a teacher of a number of years' experience that when a panel is billed as part of a presentation, that they would make both general and specific comments about the background material and the presentation. I felt that most of the time the committee spent at doing nothing, perhaps because they had not met together and agreed on what sort of a course they were going to take, so I think that they had very little to contribute. I would think that that might have been one reason why many of the members of the audience who were unhappy might have been unhappy because I think the educational process was not finished in this manner.

By Senator Schmitz: **Q.** Mr. Ford, during the discussion after the play or before the play, was the interesting legal odyssey of the play discussed, the fact that it was shown and closed up in San Francisco and then the court case which is under appeal now—was this brought out after the play?

A. No, I don't think so.

The Chairman: If there are no further questions, I would remind the committee that we have a number of witnesses under subpoena by the college so you will be able to direct some of your questions to them.

Thank you very much.

Ladies and gentlemen, normally we would take the eye witnesses, and we have a few more, but we have in the room the Chancellor of the State Colleges, Dr. Dumke. He has another meeting, and with the consent of the members of the committee, I'll depart from our usual agenda form and ask Dr. Dumke to come forward. He has another meeting and he would like to be heard so he can get to the other meeting.

Would you raise your right hand.

DR. GLENN S. DUMKE,

called as a witness, and being first duly sworn by the chairman, testified as follows:

See Appendix I for Statement

The Chairman: Any questions from the Senators?

Senator Schmitz: Dr. Dumke, I'd like just to comment first and then ask you a few questions. One of them is your comment about the ministry, medicine, law and teaching, all being professions, of course, and comparing the academic community as being larger and older than any legislative body; therefore, being a community—

The Witness: I didn't limit it to the Legislature. I said nations as well.

Senator Schmitz: I know, but it seems to me that the crux of the issue comes in here—there is a difference between the academic community, an essential part of the academic community, that is the tax-supported academic community which is the distinguishing characteristic between tax-supported education and those other professions you mentioned such as medicine—until very recently—and law, ministry and so forth. That when you get into teaching, you have two types of teaching. You have teaching that is tax supported and that's what we are talking about.

Someone just yesterday commented to me that academic freedom started out—or this interference by the government started out when the government voted to kill Socrates, and I said yes, but there's one difference between that and our present situation: Socrates was not running a tax-supported school.

I think that's what we are getting down to, the crux here.

And now getting down to my questions, one of them——

By Senator Schmitz: Q. Have you read the play or have you seen the play or——

A. I have not seen it. I have read part of it, but I operate on the theory that you don't have to eat an entire egg to know it's bad. I did read little parts of it.

Q. That leads into my second question. You said that this presentation of the play represented an attempt to study the disease. Now, this is what I would like to get to, and I'd like to ask some further questions—if we have some other witnesses, otherwise, I would like to get Mr. Ford back here to talk about this panel discussion after the play, to find out if there was any evidence, or are you aware of any evidence that this was the purpose for putting on the play, to study it as a disease?

A. My assumption, based on reports from the college administration, is that the sense of responsibility in that college and on that faculty is high and acceptable. And obviously, if we stipulate that there are other purposes besides a sense of integrity, being the desire to engage in an objective of scholarly study of society's problems—whatever they may be—then, obviously, our answer to all of these questions must be different. But my assumption is that this is a good faculty. It is capable of doing outstanding professional work. It is capable of assuming its obligations to society. And like all human beings, it also is capable of making a mistake, but I do feel that the information that has come to me would uphold at least the intent of the scholarly purpose which was behind it.

I'd like to mention one thing that ties in with this very closely here. I'm not in this field, and therefore, I cannot speak as an expert. I used to be a historian, and Arnold Toynbee, a great philosopher of history, made a statement recently, and I can't pin down the date, but it was something to this effect: Out of about 28 civilizations that have lived and died, risen and fallen, in the history of the world, only two have survived the state of moral decay that is evident currently in our own. If this is true, and I would immediately say that this play and others like it—much of our drama; too much of our literature—are all symptoms of this, then certainly, this is a serious problem which merits the attention of scholars whether or not they are in public or private institutions. If they are scholars, this is a duty which they have to society to look at this sort of disease.

Now, the question before us is: How is their study to be controlled? Who is to have the responsibilities for how it is done? And I say to that that there is only one workable answer—there may be other answers that might appear to many to be more desirable—but there is only one workable answer, and that is to put the full responsibility on the responsible faculty member so that he must assume it.

By the Chairman: Q. Aren't we apt to be accused of censorship if we put the responsibility on a faculty member?

A. No, if he is given the freedom and the opportunity to study things that he thinks are significant in this area, and if he does this in a proper way——

Senator Schmitz: Before we get off on another line of questioning, I have just one closing question that first of all I think this committee should pursue in this hearing and that is: What is the purpose of the presentation of this play? Was the study a disease or a symptom of this moral decline which you are talking about?

The Witness: This is my own view.

Senator Schmitz: Which is something I would like to find out. And further, if that was the purpose of putting on the play, studying bad plays or diseased plays, then are there not better ways of doing this than putting it on? Couldn't you do it by reading it and discussing it? Do you have to put it on to discuss a bad play?

The Witness: There may well be. This is the question, which I say, can best be answered by the person that——

Senator Schmitz: I plan on teaching my children about bad things, but I'm not going to take them down to Tijuana houses to teach them this. I'm going to try to do it in a less direct manner, and I personally think that there are better ways of teaching about bad plays than putting them on for presentation, but I'm not sure that this was the purpose. I think that's something that we should discuss, Mr. Chairman, as to whether or not it was the purpose of putting the play on.

The Chairman: Senator Richardson? May I ask you gentlemen that we make our questions as brief as possible.

By Senator Richardson: Q. Chancellor Dumke, you stated that, to follow this line of questioning, to display to the public this disease——based upon this, do you think it is the responsibility of the state college system that they should show more of this disease sponsored by the school?

A. No, I'm not defending at all any of the specifics of this situation because I think I am not qualified to speak to them. What I am saying is that obviously certain problems have arisen in the manner in which this particular play was being studied. It is up to the faculty to devise more acceptable means of studying, as long as problems of this sort have become evident, but the basic point I am trying to make is that it is up to the faculty to do it. This responsibility should not be taken from them. The faculty is, after all, the only force that can really provide a professional, high-level answer.

Q. You also stated that, Chancellor Dumke, earlier that in relationship to this particular play, a mistake was made—or words to that effect.

A. I say that it may have been made and that I preferred not to qualify myself as an expert in any of the details surrounding this because I have not been closely enough associated with it.

Q. Well, what would you say if on this campus or any other campus that not only this play but a number of plays along this theme was presented, do you think that would show rather poor value judgment on the part of the professors?

A. Well, I think we face in higher education a series of extremely difficult problems in connection with distribution of our efforts. This

is evident in the selection of speakers who come on campuses, whether they are all leftwing or rightwing or balanced. This is whether we are studying good literature as well as bad. It gets right to the heart of the question which I think Senator Schmitz asked a minute ago: What was the real intent behind this play? Was it a clinical study or was it for some other purpose?

Q. Let me rephrase that then. What criteria should be used in a state college when you believe a professor has made a number of inadequate moves, let's say, in poor value judgments. You do have ways of terminating——

A. Yes, and I listed them in my statement. There are several different ways of coping with a professor who has erred professionally.

Q. The question I'm going to ask is: Do you think that a man who continues to put on this type of play has erred professionally?

A. I would say that if a professor showed a strong addiction to this sort of dramatic literature and was not objective in his scholarly approach to it, that it would be up to his colleagues in the department and the administration of the college to evaluate his performance, but I do think it must be up to the colleagues and the administration of the college to evaluate this because they are really the only people who——

Q. You mean you believe they should have the last judgment?

A. They have the best judgment.

Q. Which is the last judgment.

A. No, I think the final judgment, obviously, is the judgment of the people of the state through the Legislature. You are always going to be in that position, but I am urging you to leave this type of judgment to a responsible faculty so the faculty will know it has to assume this responsibility. If our faculties ever are put in the position where they do not have to assume the responsibility of rising to these issues, then our problems will inevitably multiply.

Q. How many times do you think this kind of play would have to be put on before you would consider a person had erred professionally?

A. Well, I think that would be sort of a numbers game. I don't think that I can answer that.

By Senator Kennick: Q. Very briefly, Chancellor, you urged that this responsibility be placed on the faculty. We were under the impression that that's where it was.

A. That's right.

Q. You know some of us are quite disillusioned, those of us who are rooting for state colleges throughout the state.

A. I realize that. You're not the only ones who are facing certain problems because I have to go to you and ask for our budget, and incidents like this, the public misunderstandings, are always matters of serious concern, but I do want to remind you of this point: I have been informed by the administration of the college that somewhere around a hundred plays a year are put on at this college. Now, we have 18 colleges, and some of them are equal or larger in size than Fullerton, and if you add up the plays that are put on at these colleges and at the universities and at the junior colleges, they number

in the hundreds and maybe the thousands every year. This is the first time we have had a very serious question about this type of study, to my knowledge. In other words, I wish we would keep it in perspective.

By Senator Walsh: Q. How obvious can this come out? Without even putting a play like this on, you could certainly read the script. You say you've had hundreds and thousands of plays, but this is such an obvious script, and it's so completely——

A. Unacceptable.

Q. This is exactly right. Why would we let one or two or three that's popped up around the state go on and be completely——

A. I stated at the outset of my statement that you have a duty and a responsibility to question this, and all I'm saying is, that we recognize the problem in academics. It's a complicated and complex one——

Q. After the play was put on you recognized it.

A. Well, I certainly was not aware of the fact that it was going to be put on. It's my understanding that the president was not either, because of the number of items that are being produced and that are under consideration on the college campus, on a large campus, but my strong feeling is that in trying to come to an answer to the problem—and that's what I think you gentlemen are interested in—the answer lies in putting on the faculty and the college the responsibility for not letting problems arise and for using their academic freedom in a responsible manner. I don't know if I made myself clear or not, but the point I am trying to make is that if through special legislation or special rules or narrow guidelines, we ever remove from our academic community the feeling that they must be responsible for this sort of thing, that they must answer for errors that are made, that they must use this freedom that they have in a responsible manner, then our problems will just multiply.

Q. Well, I concur with you, but this isn't the first time that this play has been put on. How many colleges do we have to go through before someone finally has to get down to an investigation to find out what the faculty is doing about it? This has been put on in Davis; it's been put on in San Francisco; it's been put on in several colleges. Why does it generate to the point where somebody has to push a button and turn around and say, "All right, you're responsible, faculty; you're responsible, president; chancellor. What are you going to do about this?" And after how many times this play has been shown, and I'm sure that the people—at least I assume that the people have knowledge of the fact that this play was of the caliber that it was before it ever got to Fullerton.

A. Yes, it was also on, as I understand, an off-broadway stage in New York for a considerable length of time. It is now coming to Los Angeles with more fanfare than the Royal Shakespeare Company. It is a factor, a very frightening factor, I think, in our society. I agree with you. We ought to confront these things in ways that are acceptable, but I still feel that the faculty must have a right to study this sort of phenomenon. It must have the responsibility to study it in an appropriate and acceptable way, and that is probably where the problem arose.

By Senator Schmitz: Q. Chancellor Dumke, this is exactly one of the things that concerns me most is that after this play was put on, according to the press reports, the faculty came forth with a resolution supporting the showing of this play. Now, if we who are elected by the people to pay the bills and vote on your appropriations find out that far from doing something about this, the faculty Senate or whatever faculty group took this action actually supports this, then what is the recourse we should take?

A. Well, I think you'll find that in a situation many things are happening very fast; reactions sometimes emerge in a way which does not really express the true feelings of the majority of the people taking that action, and obviously, any faculty any time throughout history I think has had a characteristic interreaction rising to the defense of academic freedom when they feel there might be public opinion generated to move in on it.

I have confidence in the faculties of the state colleges, however. I think they are topnotch professional people, and by and large. I feel that their attitudes towards this problem would be much as our attitude would be in terms of wishing to assume full responsibility for proper approaches.

Q. Well, Chancellor, if I might ask this question: Let's say the faculty of this college maintains its position of support of this play, and let's say like things happen all around the state where the faculty supports that which those who pay the bills are obviously opposed to. Now, if you were a legislator elected by the people to, among other things, pass on the budget, what action would you take with these faculties, if and when these faculties are obviously not doing their own policing? And were, as you say—and I'm very familiar with the tendency to band together when a member of the community—it's a great big fraternity—I'm very familiar with this at the junior college level, and I'm sure it's even more intensified at the four-year level. But it is a big fraternity. When one member of the fraternity is attacked, no matter what he did, there is a tendency to band together which beclouds this responsibility that you have just said we should bestow and allow on the faculty. So when the faculty units do not take the responsibility, what are we, as legislators, supposed to do?

A. Well, I think the thing I'm trying to say is that our faculties are responsible. They will be responsible.

Q. Well, what if they exhibit a tendency to not act responsibly, at least responsibly as far as those who pay the bills are concerned?

A. Well, then, my only answer to that, Senator, would be that there would be no quicker way to create a truly irresponsible academic community than to deprive it of our ability to employ top-quality people.

Q. Basically what we should do is to write a blank check to the academic community and have nothing to say with what goes on?

A. No, I'm not saying that at all. I think that our discussion today is evidence of the fact that the academic community is concerned about this problem and it is concerned with your concerns about it, and what I am trying to do is to demonstrate to you that we have an academic community that I am convinced is able to respond professionally to such problems.

Q. All right, let me assure you, Chancellor Dumke, that we five members of this committee are not the only ones concerned. This is one of the biggest topics of discussion in the Sacramento Legislature is higher education. We're waiting for some answer from the administrators and from yourself and from those people who are hired caretakers—and I don't mean to say that derogatorily at all—or who we assume are the hired caretakers, but now you are telling us that you are just going to let this thing go to the faculty?

A. No.

Q. Now, I haven't seen any evidence from the faculties that they are going to do anything about the things that are concerning the people of the state in higher education. And I would not like to take the action that I think we are being forced into.

A. Well, let me elaborate on this point that you brought up. We have already had a full-scale discussion of this problem. I've had a discussion with this with the statewide Academic Senate, meeting in San Francisco. This is a matter of considerable discussion at our presidents' group which meets regularly. It will be the subject of further discussion at a similar meeting of this group this afternoon. It has been a matter of serious concern among our trustees, and I assure you no one is brushing off the problem. What we are trying to do is to come up with an appropriate answer, and the answer I have stated this morning—I'm not speaking for anybody else; I'm speaking for myself—but the answer I stated this morning, I think, is the workable answer, and I doubt very much that there are going to be—

Q. It's a workable answer that has not worked so far, and things are getting worse. The other thing is you told us, "Don't interfere; just let the faculty do it." As far as I can see, I can almost see in my own understanding of the history of education, recently you can see a direct proportional ratio in the rise of the power of the Academic Senate with the problems we have got on our campuses, and yet you are saying that the solution to the problem is the faculty, when I can see a direct proportional ratio in the problems of the campuses coming from the transfer of power from the administrator over to the faculty.

A. Well, I think in higher education we have gone through a great many historic cycles. Currently, the trend is in the direction of more authority going to the faculties and also to the student government. There have been other times in history when a good bit of the influence in higher education was related citizen groups, affiliates and boards, and there was a time when the administrator was really dominant. I think today we have developed sort of a working relationship whereby everybody in the academic community is trying to work together to produce the best answer to these problems and where as admittedly the administrator does not have the dictatorial authority that he has historically had in higher education. I think there are benefits from this new system as well.

Q. Do you think it is just a coincidence that this is now the period when the faculty has more—as you said, yourself, we are in a cycle when the faculty has more to say about running the colleges—that this is the very period when we are having all the trouble in the colleges? Do you think this is just a coincidence?

A. Well, I—

Q. I don't think it is, and yet you're saying that the solution to the problems we have today is to do that which has brought about this problem, as far as I can see—I don't think this is a——

A. Well, there are two things that are happening at the same time, and whichever you blame for the incidents, I think it's a matter of subjective judgment. You're quite right; there has been an increase in faculty authority and responsibility in academic government, and some of the campus problems have increased at the same time that this authority has increased, but at the same time, we have developed in the last decade a far more turbulent society, a society which is far more challenging to the traditional moral code than we have ever had before, and maybe this is the cause.

Q. Yes, but which came first? How do you know that the situation on our campuses is not causing the turbulence in the society or that society——

A. It's a complicated question and it's worthy of lengthy discussion. I don't think anyone has the answer.

The Chairman: Senator Richardson has a couple of questions and then we'll excuse you. I know your meeting is set for 11, and I'm sorry we're holding you, but we appreciate this very much.

By Senator Richardson: **Q.** First of all, I'd like to give recognition to your background in history and as a historian, and I was extremely interested in the comment you made relative to the moral decline problem and decay which I think is becoming more imminent, let's say, in society, from which, very few have ever been able to extricate themselves from this problem. You do say you see this kind of problem existing today. There's often been a great deal of question over—and by the way, let's get off that a minute—do you believe that there is any part of that moral decay evident within the college system?

A. Well, I think that any academic community—we just had a very interesting debate on this very point between Superintendent Rafferty and President Hitch, which has been in the press the last few days, whether the outside influences the campus or should influence it more or whether the campus should be, as Dr. Rafferty expressed it, “a beacon to lead society.”

My only answer to that is that both are happening. What we have is an intrusion of what is happening in society onto the campus. There is a rub off. There's no question about it. It can't be avoided.

Q. In other words, you believe——

A. But the campus has the responsibility to resist that and to lead society in directions that might be higher and more proper, and I think it's this kind of tension and this kind of turbulence and problem that we are facing today in sort of an accelerated manner than we have in the last several decades.

Q. Would you say that this moral decay is rubbing off on the academic community, so to speak, externally?

A. Well, in spite of the fact that I have my arguments with the Academic Senate—we're having one right now—I have high regard for faculty people. I think by and large most of them are very idealistic individuals who go into this profession because they want to perform a service, and my disappointments in this type of evaluation have been very few. I think our faculties are good people.

Q. I would tend to agree with you on that that there are many people of very high caliber involved in serving our university system. We certainly have no intention of discrediting the vast majority of fine human beings who are working in the State of California. I'm very happy for our State. But my concern lies with a few who have a tendency to discredit the many.

A. That's right.

Q. This is our concern. It's also our concern on the few students who have created a great deal of concern to the many. What I am asking and trying to find out is to what degree is this part of the state campus and what degree is your office or anybody else doing anything about it?

A. Well, I think that, to answer that question in two parts, first of all; yes, it's a problem. The few, the tiny minority, can often discredit the vast majority, and it's a matter of serious and continuing concern with us.

Q. If they are a tiny minority, why can't the intelligent majority like yourself and the other people get rid of them?

A. Well, one of the problems that we face in academics, I think, is the same problem that people face out on the streets and in the cities. We do have constitutional protections. We do have academic due process. We do have a rather lengthy means of evaluating these problems, but I refer you, Senator, to the record of the state colleges in all of these areas. We have not, comparatively, been as turbulent as most institutions of higher learning in the nation or in the state, and when this turbulence has occurred, there has been a response, and I think a responsible response. And what I am trying to do today by my asking to appear here is to indicate to you and your colleagues that we are as anxious in this type of problem to be effective and responsible as we have tried to be in some of these others, and I hope that the suggestions that I have placed before you will warrant your consideration, because I honestly believe that however well intentioned any attempts to remove from the individual faculty member the full sense of responsibility that he must have to confront and solve problems of this kind, will but multiply manyfold, the type of thing we are trying to stop.

The Chairman: Chancellor Dumke, I want to express my appreciation and that of the members of the committee for your having made yourself available, particularly in view of the pressure of time, and I certainly regret that we had to keep you here later than 11. I would like to thank you again for coming.

The Witness: Thank you very much.

The Chairman: Ladies and gentlemen: The committee will recess for five minutes. We will be right back and will run until 12 o'clock. It is our intention then to reconvene at 1:30 and run until 5 o'clock. We will take a five-minute recess at this time.

(Recess.)

The Chairman: The committee will reconvene.

At this time, we'll call a second eyewitness, requested by the administration of the college, Dr. W. Van Willis.

Dr. Willis, the only information we have on you, sir, is that you were an eyewitness to the November 9th performance of *The Beard*.

I'll swear you in now, and I would appreciate it if you would give us some background on yourself.

DR. W. VAN WILLIS,

called as a witness, and being first duly sworn by the chairman, testified as follows:

The Witness: I am William Van Willis. I live at 1065 Eugene Drive in Fullerton, and I am an assistant professor in the chemistry department at Cal State Fullerton, and I attended the third performance, on November the 9th, of *The Beard*.

By The Chairman: Q. Did you have a presentation to make?

A. No.

Q. Would you say that the impressions you received were substantially the same as our first witness, Mr. Drake?

A. Insofar as my personal reaction, yes.

Q. I'm not asking you for your reaction, sir, I'm asking for your testimony as an eyewitness as to whether you saw substantially the same that Mr. Drake saw?

A. Yes, I saw a simulated sex act performed.

By Senator Schmitz: Q. I might ask the same question I've asked the others, because I think it's getting pretty well past—have you read a copy of the play?

A. No, I haven't.

Q. Then I can't ask you the same question as the others, but I think we have almost concluded from the other witnesses that it does pretty well follow the script.

By Senator Richardson: Q. Mr. Van Willis—

The Chairman: Doctor.

By Senator Richardson: Q. Doctor, how do you spell your last name?

A. Willis, W-i-l-l-i-s.

Q. Dr. Willis, what was your impression of the play? Do you believe that it had any social redeeming factors to it or something to be learned from it?

A. I was shocked. My reaction was, I was shocked.

Q. Have you ever seen anything comparable to it before?

A. No.

By Senator Schmitz: Q. Did you stay around for the panel discussion after the play, Dr. Willis?

A. No.

By The Chairman: Q. Just to run over the testimony that we had here previously, did the girl have a slit in the right side of her dress?

A. Yes.

Q. Almost to the waist?

A. No.

Q. How far up the body did the slit go?

A. Just above the knee.

Q. How far were you from the stage?

A. Approximately 25 feet.

Q. When she walked, was one leg exposed?

A. Yes.

Q. Did she sit diagonally on a chair?

A. Yes.

Q. Did the other actor kiss her feet?

A. Yes.

Q. Did he continue kissing her leg?

A. Yes.

Q. Moving upwards?

A. Yes.

Q. Did he go as far as you could see as far as he could go in that direction?

A. Upwards? Yes.

Q. Did her body undulate noticeably?

A. Yes.

Q. Did she move, moan, groan, and speak, and in every way possible indicate sexual enjoyment?

A. Yes.

Q. Did she indicate the achievement of a sexual climax?

A. Yes.

Q. What would you say was the farthest distance he would have had his mouth from the pubic part?

A. Less than four inches.

The Chairman: I have no further questions. If there are no further questions, thank you for your testimony.

The third eyewitness subpoenaed by the administration of the college is Dr. Roger Dittman.

Will you raise your right hand and be sworn?

DR. ROGER DITTMAN,

called as a witness, and having been first duly sworn by the chairman, testified as follows:

By The Chairman: Q. Did you have a presentation to make?

A. Nothing formally. I would just like to speak extemporaneously about what I saw.

Q. The reason you're being called at this point is because according to the administration you were an eyewitness——

A. Yes, I was.

Q. To the performance. So let me ask you, in the interest of time, would your testimony as to what you actually saw—not your opinion as to what it meant to you—but your testimony as to what you actually saw, would this be substantially the same as the testimony of the other witnesses we have heard?

A. Well, I think it differs in several significant respects.

Q. Will you point out those differences?

A. Well, during the play, which I thought, first of all, was very well performed. The play gives you quite a lot to think about.

Q. I understand that, but——

A. The final act, which is quite electrifying——

Senator Richardson: Excuse me, Mr. Chairman.

By Senator Richardson: Q. What did it give you to think about?

A. My interpretation—I'm not a drama critic, I mean, I'm a professor of civics, not drama, but I try to attend as many of the cultural

activities on campus as I can because I consider it to be one of the advantages of being on a university campus. But I think there are several things that the play meant. One was the choice of Jean Harlow and Billy the Kid as the main characters in the play and the type of people that they turned out to be. I don't know what they were like in real life, but they are portrayed as quite crass characters—I think, criticizing the public in general for holding up people like this as popular heroes. I think there are other things like when Jean Harlow—of course, a lot of this is predicated on a previous reading or previous experience with literature—I was reminded of Dante's *Divine Comedy*.

Q. What part of the play reminded you of Dante's *Divine Comedy*?

A. Well, I can get to that. The contrast between the play—the play took place in heaven.

Q. It did?

A. And between our concepts of heaven and the way we idealize it and the people that we really are in our animal existence, and it's the same type conflict I think Mark Twain wrote about in his——

Q. Well, may I ask—wherein did you contemplate heaven? Was this part of the play itself?

A. That's where the play took place, in heaven.

Senator Walsh: He's not talking about that play, he's talking about Dante's.

The Witness: No, I'm talking about *The Beard*.

The Chairman: In my reading of this, I can't quite get that feeling.

The Witness: It depends on what you put in your heaven, which is the crux of the issue.

By Senator Richardson: Q. In other words, you believe that this kind of action could potentially be heaven to some people?

A. This is what Mark Twain found so curious about the American people.

Q. I'm asking you specifically about this play. You believe it could be heaven to some people?

A. Yes—I found it an analogy between that made by Michael McClure and the comments which were made by Mark Twain in his book——

By Senator Schmitz: Q. Dr. Dittman, does this connote heaven to you? Did it give this impression to you?

A. Well, let's say it connotes heaven more closely than harp strumming does.

The Chairman: Senator Walsh has a question to ask him, I believe.

Senator Walsh: No, I don't want to ask him anything.

The Chairman: Senator Schmitz has a comment.

Senator Schmitz: No, I just have a facetious comment to make—my analogy would be to a stag party or a Tijuana exhibition, it came a lot closer, but you and I viewed it differently. I didn't see it, I just read the book. And I suppose you can read into these things all you want, but my question was—this may be extraneous, but I was just curious about the button you're wearing there. I can't read it.

A. It says I'm registered to vote. I registered in the Peace and Freedom Party.

Q. That's all right.

The Chairman: If there are no other questions——

The Witness: I thought you'd be curious about my testimony about what I saw in the play.

The Chairman: If you have further testimony, continue, please.

The Witness: Well, I hadn't quite explained what I saw—unless you want to hear more interpretation, because I could go on with what it means to me.

The Chairman: We would appreciate, in the interest of time, if you would confine it to what you saw.

A. Towards the end of the play, where the play tended to become rather repetitive in the language—the same phrases were used in different juxtapositions, and then finally, the lights were turned down considerably for the final, rather electrifying sequence, and there was kind of a hush that went over the whole audience, and it was done rather beautifully—almost like a ballet, you know, with the straightened, graceful limbs and simulated act of sexual intercourse or cunnilingus, I think, was meant to be conveyed to the audience. This is the impression that I got.

There were some questions as to whether or not she had any undergarments on. I did see that she had undergarments on because the slit that was up the side of her dress, it did come up high enough to show that she had a second pair of pants that were underneath the first pair of pants that she took off along with her stockings when she was finally convinced she should be divined.

Senator Walsh: Well, this is in direct conflict with the testimony that has been given here before.

The Witness: It may be, but——

Senator Walsh: The slit was only supposed to be three to four inches above the knee or just above the knee——

The Witness: I'm not sure how high it went, but I do know that when she moved around during the performance of the play, because there was quite an active sequence like when she was thrown down on the floor once, and I could see that there was a pair of pants underneath her dress.

Senator Schmitz: Mr. Chairman, I hate to keep reading from this book—I really do, but when you say that the last scene is like a graceful ballet, I just wonder if this stage sequence—it's an inch above what I read before—"Harlow sitting on Kid's lap with one arm around his neck—he kisses her on the shoulder and neck—she strokes his cock—" this was done gracefully. Is that what you're saying?

A. Well, I think, the whole play was very well done. I don't know how selective your sampling of witnesses is here, but I know the people at the play gave the play an overwhelming ovation. It's the largest ovation I've seen at any play that has been performed on the campus. As a matter of fact, I believe it was a standing—I attended the second half of the first performance. I just happened to be walking through the lobby and noticed that there was a play going on, and I try to attend them when I can—and I saw the second half of the first performance and then stayed for the second performance to see the whole thing, and I believe there was a standing ovation at the end of both plays, and certainly an overwhelming ovation for both plays.

Senator Schmitz: Mr. Chairman, if I might pursue this——

By Senator Schmitz: Q. This would then seem to indicate that the play was not—at least the results it had with the audience was not a study of a disease of our society?

A. Oh, I think this did make many profound comments about our society.

Q. I mean it wasn't a laboratory study of a disease then, the standing ovation—I don't mean to indicate that this was the result it had——

A. I don't think the play has to be apologized for. I mean, the play is not the disease, it's commenting about the disease.

Q. Well, what disease is it commenting about?

A. Well, one—well, maybe I shouldn't call it a disease, but I think it is kind of regrettable that the public in general does not have more idealistically inspiring heroes than the ones in the play.

Q. Well, I always thought that Billy the Kid was a halfwit and he appeared to be that in this play. Now, I didn't have a different idea. In other words—maybe I have a historical rather than the literary idea of Billy the Kid, and I always thought that Billy the Kid was a half-wit, this was his historical place, and when I read this, I simply thought he was playing what he historically was.

A. He's not one of my heroes either. That's the point.

Q. But I disagree with your interpretation that we have built up Billy the Kid as a hero. Maybe other people do. I never did, and therefore, I did not get the same thing out of the play as you did. But I wanted to pursue this question—you stayed for the panel discussion after it?

A. No, I attended the second act. There was no panel discussion.

Q. The panel discussion was only after the first one?

A. Right.

Q. Getting back to this idea of a study of a disease, do you think that—you do not think that the play was a bad play?

A. I thought it was quite a good play.

Q. Therefore, it was not, as far as you are concerned, it was not shown to show what a bad play it was?

A. No, I don't think so.

By Senator Richardson: Q. Just a short question—in other words, Dr. Dittman, you did state that you thought it was a good play. Would you recommend this to the students of your classes to view this?

A. I think it is a function of the university to examine ideas and to serve a critical and analytical function in society, and I know I would not want to be prohibited nor would I want to prohibit anyone else access to these ideas.

Q. Would you recommend this to your students?

A. I think I would.

Dr. Lowery: Mr. Chairman?

The Chairman: The consultant from the Senate Education Committee.

Dr. Lowery: Dr. Dittman, as I understood, or I thought I understood, this play was an outgrowth or a part of a drama workshop?

A. Yes.

Q. And it was given to other drama students and some sort of panel to analyze and make some comments on?

A. The panel was on a Wednesday night.

Q. But this was the original intent?

A. Yes.

Q. Why were you there if you weren't in the drama department?

A. No, but I am a faculty member, and I think I was recognized as a faculty member as I came in. I came in at the end of the first performance.

Q. I realize that. You were there because you wanted to see the play?

A. Yes.

Q. So in effect, it was somewhat open to the public?

A. Well, I don't know how tight their security was when they were taking tickets in the beginning, because I came in towards the end and I got in because I believe I was recognized as a member of the faculty.

Q. How about the second performance?

A. Well, I believe the second performance was performed before the other drama students, if I understood correctly, who are doing a performance simultaneously of modern dance.

Q. You were just there as a member of the general public?

A. I was there as a member of the faculty, I believe.

Q. I'm trying to establish was it in fact a workshop part of an instruction program or a performance for anyone who wanted to come?

A. Well, I believe essentially it was of workshop character.

Q. But it was open to anyone who wanted to come in?

A. I don't know. Being I was a member of the faculty, I couldn't try to come in as a member of the general public to see if I would be challenged.

By the Chairman: If there are no other questions for a moment, let me ask you this: Were you present at a performance of a play called *The Dutchman*?

A. I have seen *The Dutchman*, but I did not see it on campus.

Q. You did not see it on campus?

A. No.

By Senator Schmitz: **Q.** Having seen *The Dutchman*, do you think that would be a suitable play to show on a college campus?

A. Yes, I do.

By Senator Richardson: **Q.** Do you believe that there are things that should not be shown on campus?

A. Well, I think our greatest feelings are in the things we don't say. As a matter of fact, I think these hearings are probably having that kind of effect.

Q. What shouldn't we say on the campus?

A. We shouldn't say on the campus? Well, I think we shouldn't say things that compel people to immediate action before they can think. I think all other kinds of speech should be allowed. If people can reflect on what has been said, so they have some opportunity to evaluate and make their own decision based upon accumulation of a wide exposure of ideas and opinions, I think all these kinds of speeches which do not require immediate action should be——

Q. In other words, doctor, you are saying that anything goes, pretty much?

A. Yes, I think that's what our Constitution means.

Q. Might I ask—Is there any type of sex act that is put into a play you would think improper to show on a college tax-supported campus?

A. Well, what I consider to be obscene is not sex, but violence—killing, napalm.

Q. Or Senate investigations?

A. But sex, I think, should be considered to be rather an expression of affection and a more healthy attitude toward sex.

By Senator Schmitz: Q. Are you saying in a long way that there is no possible sex act which should be excluded from a play on a college campus?

A. I am not offended by any sex act.

Q. So then as far as you are concerned, you would defend any sex act as long as it is in a play, even if it were shown on a college campus?

A. I don't think there is any—if I wanted to prohibit people from doing things, their actions and so forth, I would have to show that there was some grievous social ill that would be resultant from the act, and it would be incumbent for me to demonstrate that before I go around passing laws and saying to people that they cannot do this and so forth—

Q. That's the point I'm getting at—this is the point—that there's no specific sex act that you think should be excluded, as such?

A. Legally, yes.

Q. Wait, as far as you're concerned, your personal—

A. Well, I would—

Q. Not legally.

A. The play I would put on campus or advocate be put on campus would be those which are within the capability of society—

Q. I know, antisocial—

A. Of society to accept. As society's mores change, things which are capable of being presented will change. And we are undergoing some kind of a moral revolution in this country. There's a generation gap which is probably being manifested here, but I think that—

Q. With you at the front lines at all times.

The Chairman: I have no further questions; however, would you make yourself available this afternoon in the event that there should be?

The Witness: All right. Thank you.

The Chairman: I would like to call Randy Smith to the stand, please.

Raise your right hand.

RANDY SMITH,

called as a witness, and being first duly sworn by the chairman, testified as follows:

B the Chairman: Q. You're familiar with a magazine known as the Los Angeles *Free Press*; is that correct?

A. Yes, sir, Mr. Chairman.

Q. Do you have knowledge that it has been sold on the newsstand at the campus of Cal State Fullerton?

A. Yes, it has been and still is being sold.

Q. Is this on the campus property?

A. Yes, it is.

Q. Would you read a few excerpts from it for the record so we will understand what type of magazine we are talking about?

A. Yes, Mr. Chairman. I, during the week of January 5th-11th, I purchased the following copy, which is the issue of January 5th-11th, and I'll read quotations from that.

In an article by Dr. Eugene Schoenfield called "Hippocrates"—I'll read—

"Clinical observations of women masturbating indicate that concentrating on the clitoris alone during sexual foreplay may be too much of a good thing. During auto-manipulation women stimulate the entire mons area, and if they stimulate the clitoris directly, they give their favors to the shaft rather than the glans.

"To be blunt, a thigh, knee or heel of the hand may be better appreciated than a digit."

And then from an interview with Mr. Gordon Williams which was conducted by Paul Eberly, I believe—

"**Williams:** Ah bullshit."

"**Williams:** I don't care either. So fuck it."

"**Williams:** Hell no, I've been on this fuckin' publicity tour for two months, and I haven't been sober one day for two months. Every day, they take me on some radio or TV program—the same bullshit over and over again. I used to drink with Brendan Behan a lot, and one time, he asked me, 'Have you ever been to fuckin' America?' "

"**Williams:** Hell yes! God! When I published my third book in London, I told 'em, 'Look, everybody else gets a cocktail party. Why don't I get a cocktail party? I want a cocktail party! All those attractive young widows that adore young writers . . . Bring all those widows! I'll fuck the ass off them!'"

The Chairman: I think that will be sufficient.

By the Chairman: Q. I'm asking for an opinion now. Is it your opinion that such literature distributed on the campus would possibly create or help create a moral climate which would make a production like *The Beard* acceptable?

A. Well, personally, I don't think it would be anything else but objectionable, but I would assume that if a student or faculty member could see this being sold on a regular newsstand in the snackbar area, I would assume that the student might assume that anything could go.

By Senator Richardson: Q. Where did you purchase this publication? I believe you called it the *Free Press*?

A. I purchased it in the snackbar, and I believe already turned into the committee are some photographs—this is what they call in the patio on the second floor—outdoor patio with a roof over it, and there are vending machines in the area with tables for students to eat at.

Senator Walsh: Q. That's on campus?

A. Yes. Also sold in this area is the *Christian Science Monitor*.

By the Chairman: Q. Mr. Smith, I show you photographs there and ask you to identify them and see if in your opinion they are photographs of this newsstand at the college?

A. Yes, Mr. Chairman, they are pictures of the newstand and the general area surrounding it.

Q. Does one of the pictures show the *Free Press* actually being offered for sale?

A. Yes, sir.

The Chairman: Any questions from other Senators on this matter?

By Senator Richardson: Q. Who controls the sale of this—is this just the kind you can walk by and pick up or is there somebody there actually selling them?

A. Well, these are actually out of a vending type newsstand. There's no one controlling it.

The Chairman: That's all for now. Make yourself available to us this afternoon, however.

Eric Bass for just one question.

ERIC BASS,

called as a witness, and being first duly sworn by the chairman, testified as follows:

By the Chairman: Q. Are you the photographer who took those pictures which Mr. Smith has in his hands? Would you identify them, please?

A. Yes, these photographs were taken by my organization.

Q. Look at both of them. They are in fact the actual photographs taken of the newsstand and they were taken on the campus at Fullerton State College?

A. Yes. These were taken——

Q. When were these taken?

A. These were taken Tuesday or Wednesday in the afternoon.

Q. Has there been any alteration of any kind in those photographs?

A. No, there has not.

Q. Thank you very much, Mr. Bass.

The Chairman: Bring the photographs back. We only have one copy at the moment.

We have time for one more witness, possibly.

We have a Mr. J. William Goff, an eyewitness to the performance, who is subpoenaed at the request of the administration of the college. While he's coming up, let me say for the record here, as to the number of persons attending the performances, the committee has been given a faculty counsel newsletter over the signature of Dr. James D. Young, chairman of the Department of Drama, wherein on page 3, paragraph 17, I guess it is, he states that on opening night, 131 attended; Thursday night, 142 attended the first performance and approximately 60 students at the second performance. This was brought out earlier.

Dr. William Goff, raise your right hand and be sworn.

Mr. Goff: Not doctor.

The Chairman: I'm sorry.

J. WILLIAM GOFF,

called as a witness, and being first duly sworn by the chairman, testified as follows:

By the Chairman: Q. Do you have a presentation to make? Since you were called at the request of the college, I have no information——

A. I have no formal presentation to make.

Q. Would you say what you observed—I'm asking now for your eye witness opinion—substantially is what other witnesses described?

A. Basically on part of them. There's a difference of opinion on what they saw in some cases.

Q. This, of course, is very true. A number of people can see things——

A. I can substantiate that her dress had a slit up the side some three or four inches above the knees. I felt that she had on a second pair of pants at the time of the wedding—excuse me, at the time of the performance of the act.

Q. Since you are under oath, I must stop you and ask you, since you are under oath, I have to clarify something here—I think you said something you didn't intend to say.

A. That is correct; I did.

Q. Did you say that you felt that she had a second pair of pants?

A. It was my opinion that she did have.

Q. It was your opinion from your observation?

A. That I saw she had a second pair of pants on; that's correct.

Q. Go ahead.

A. The conclusion of the play, one point that I thought was important was the fact that the ending of the play was in the dark, basically. The stage lights were dimmed out. There was a revolving——

By Senator Richardson: Q. To clarify this, you said you saw her pants, her underwear?

A. No, sir, I didn't say I saw it.

Q. You assumed they were there?

A. Yes. The reason I assumed it is because several times, walking about the stage, it was evident—you could see the outline of the second pair of pants, an embossed area against the dress.

Q. But the point in question is the last part of the play, when she took off—the very last part of the play when she took off her pants, I believe and threw at him or threw them on the floor and he picked them up; is that correct?

A. She took off one pair.

Q. Yes, but at that point, did you suddenly notice that she had on another pair of pants on underneath or you saw the outline at that point?

A. After that, yes.

Q. Is this true that this is during the period it is starting to get darker in the theater?

A. No.

Q. It's still quite light then?

A. Yes, both stage lights are on.

The Chairman: Anything further to add—Senator Walsh.

By Senator Walsh: Q. I would like to ask what your position is.

A. My employment?

Q. Yes.

A. I'm not connected with the college.

Q. And you were at this play? Did you get invited to the play?

A. I was there as the guest of the director.

By Senator Richardson: Q. May I inquire—would you give a little background on yourself? It will be appreciated.

A. I have lived in Fullerton for just about nine years. I am employed by a holding company. I'm corporate officer and director and controller of said company.

I have known the director of the play for better than a year. I was invited by him. I think I remember a conversation we had possibly last summer that I told him when he next directed a play, I would be interested in seeing it. For this reason, he came to my office and said the play was going to be on. I had no knowledge of the play. I had never seen the book until I saw Senator Schmitz hold it up. At that time, he brought me—I think you would call it a pass rather than a ticket. It wasn't a printed ticket. It was a handwritten pass admitting me to the play, at which time he told me it was not a public performance and therefore that was why I was given a written pass.

By Senator Schmitz: Q. Was it your impression that the idea of the final act of the play was to present to the audience the idea of an act of oral copulation just as much as a stage kiss, although they're not kissing, the idea is to portray a kiss? Was it an idea that the act was to portray an act of oral copulation?

A. Yes, I viewed it in the sense as you described in the example.

Q. Were you there the night of the panel discussion after the play?

A. Yes, I was at the first performance.

Q. Did you stay for the panel discussion?

A. No, I did not.

The Chairman: Any other questions? Thank you very much.

It being approximately 12 o'clock, I believe the committee will take a recess now. We will reconvene at approximately 1:30.

Let me caution all witnesses under subpoena that under the law you are expected to be here this afternoon just as much as you were this morning unless you have been excused by the committee. We will recess until about 1:30.

(Noon recess.)

The Chairman: The hearing will reconvene. During the lunch hour, we have had a couple of requests that more background be established on two of the witnesses—Randy Smith and Eric Bass. I don't see Randy Smith in the audience but I do see Eric Bass. Eric, will you come up?

You will recall that Eric is the photographer who verified taking the pictures.

You're already under oath, Eric. Just consider yourself under oath again.

I think the parties that contacted me wants you to answer a few questions about your background.

By the Chairman: Q. What is your address?

A. My business address is 8870 Brookhurst in Anaheim. I am a commercial photographer and have been for a number of years. Basically what else do you want?

Q. Are you in the employ of any member of the committee?

A. No.

The Chairman: Let me find the gentleman who wanted this.

Is there any other background that you had in mind?

Mr. Phillips: I was interested in who had employed him to take the pictures.

The Chairman: He was employed by the committee to take the pictures.

Mr. Phillips: So that's a direct contradiction to the other statements.

The Chairman: No, he is not in the employ of any member of the committee, however, the committee did employ him to take these particular pictures. Any other questions?

Mr. Phillips: No.

The Chairman: Eric, any other questions?

The Witness: Nothing that I can think of.

The Chairman: Thank you very much.

Let me say for the benefit of the audience that one of the duties the committee has is to investigate to the best of our ability all aspects with which the Senate charges us to investigate. During the course of this investigation, we do have the power—and I think the duty—to make whatever investigation and preserve whatever evidence we can.

Is Randy Smith here yet? He's not.

Okay, we will next call Mr. Wayne Devorak, please. Raise your right hand, please.

WAYNE DEVORAK,

called as a witness, and being first duly sworn by the chairman, testified as follows:

By the Chairman: Q. Be seated on the right, please.

Mr. Devorak, were you one of the participants in the production of *The Beard* in Fullerton on November 8th and 9th, 1967.

A. Yes.

Q. You were?

The Chairman: Are there any questions any member of the committee has to ask Mr. Devorak?

By the Chairman: Q. Do you have any testimony you'd like to present.

A. No statement, no.

Q. Did you feel that you received educational value?

A. Yes, I did.

Q. Were you a member of the student body of the college at the time you were in the play?

A. I don't know if technically I'm a member. I am completing my master's degree and working on my thesis, but as far as being enrolled in the college at that time, I was not.

Q. You were not enrolled in the college at the time you were in the play?

A. No, sir, I wasn't.

Q. Do you have any opinions, anything you'd like to express to the committee as to the propriety or impropriety of putting this play on at a tax-supported institution?

A. No.

By Senator Walsh: Q. Mr. Devorak—

A. Yes.

Q. I have before me, submitted, I believe, by the district attorney's office in the City of San Francisco, a photograph of the portrayal of *The Beard* in that area at the time it was put on, and I would like to request that you observe these pictures and give me an answer as to whether this is the type of performance that was put on in the play here, as an observation on your part.

A. The type of performance?

Q. Not the performance—it's the portrayal of your play or the play you were engaged in—was it the same exhibition that these pictures here portray?

A. Oh, all right.

Q. If you would take a look at them.

Senator Walsh: For the rest of the committee's benefit, these are the photographs of the assumed simulated copulation act here. I was curious to know—although I know it was in another city, but it's the same play, if this is the type of function that was portrayed?

A. It's similar, although I was not that high on her body.

Q. But it is your testimony that this is the portrayal that was intended to be portrayed in this action?

A. Oh, yes, uh-huh.

By Senator Kennick: Q. You say there was educational value derived by yourself from this. I ask, as a man unfamiliar with drama—

A. Okay.

Q. What was the educational value?

A. Well, it can be approached on a number of levels, and I can tell you the levels that we did approach it on. Number one, sociologically it had very much to say about our society. Psychologically, we went into depth with Freud, things of this nature.

As an acting challenge, it was the most difficult role I have ever had to play. It required a tremendous amount of control.

(Laughter from audience)

As a directorial exercise, it was a very difficult play because it is written in poetry. As a matter of fact, it probably is considered more of a poem than a play, and this is very difficult to bring about to make it look like a play.

I think that from the standpoint of the playwright, it would be very interesting in a playwright class to criticize it and discuss the strengths and weaknesses of it, so there were at least five levels, if you approach it maturely, I think that you could learn something from it, and I think that everyone concerned did.

Q. Do you think the school is better or worse off without it?

A. Well, that's hard for me to say because a lot of good things might come from this—you know, about academic freedom or something of this nature, but I don't know—I suppose the school has been harmed because of the unfavorable publicity this presentation has received.

Q. Would you perform the role again?

A. No.

Q. Why?

A. It's caused too many problems.

Q. To you, personally?

A. No, not to me personally.

Q. You mean you feel that your portrayal brought embarrassment to a vast amount of other people?

A. Well, I don't think—I'm not sure—I didn't speak to everyone in the audience so I can't speak for them, but the comments I heard were favorable, and the applause after the play was over indicated that the audience did enjoy it. And it was pretty strong applause. I don't know exactly how to go about this, you know, determining it.

Q. But you wouldn't portray the role again?

A. No.

Q. If given the opportunity?

A. No.

Senator Walsh: Going back to these photographs, I'd like the chair to acknowledge that the witness has testified that these are of the same type assumption here on this particular play, and I'd like the pictures, the photographs, to be made a part of this public record.

The Chairman: Without objection on the part of the committee, it is so ordered.

By Senator Richardson: **Q.** Mr. Devorak, do you believe that *The Beard* is a legitimate study of what is happening in the theater today or the direction it is going?

A. Yes, of avant-garde theater. I certainly don't think it's a commercial play, but I think it was a very valuable thing to study.

Q. What was the substance of the critique after the first performance?

A. It's very difficult to summarize this because everyone had different viewpoints, and nothing really was—no final conclusions were arrived at, so I really couldn't tell you what the substance was.

Q. I think we could agree that there was a great deal of what would be referred to properly today as vulgarity—the terms that are used in a vulgar manner today—in the play itself. Does this add substantially to the mood of the play or what was it for?

A. This is one of the points of the play because playwrights don't use language, you know, just off the top of their head. This language was necessary to the development of the characters because it's a part of their problem as people.

Q. You say these characters are extremely vulgar characters?

A. Yes, they are.

Q. As an actor, were you trying to portray a very vulgar character?

A. I was trying to project a human being with a definite conflict.

Q. According to information the committee has through the district attorney's office, it states here that you were licensed by the State of California as a school teacher currently employed by the Los Angeles Unified School System as a substitute teacher; is this true?

A. That's correct.

Q. What school do you teach at?

A. As a substitute?

Q. Yes.

A. You don't—a substitute teacher doesn't go to any particular—

Q. I understand that, but what schools have you been mainly teaching at?

A. Boshay, Muir, Reece, Audubon—a number of them.

The Chairman: Are there any further questions?

By Senator Richardson: **Q.** What subjects did you teach in Los Angeles Unified School System. Do you teach a particular subject?

A. General areas. My field is English and drama, and I am called for those particular areas, but I do sub for other areas.

Q. You have subbed in teaching drama?

A. Not in drama, no.

Q. Thank you.

The Chairman: I'll ask the same question that Senator Schmitz has asked of so many witnesses. Was the play as printed in Evergreen and as we have it here substantially as the play was produced?

A. With the exception of a few things, yes.

Q. What was that?

A. Well, I don't know if it was clear about the underwear situation when she took off her underwear. She was wearing two pairs as part of the costume. And there's a section in the end where it says that she was sitting on my lap, and she wasn't. There's also a question that says she strokes my cock, which she didn't.

Q. She did not?

A. No, she did not.

Q. There was a part that was added in your production—you did hold her underwear, I believe—up to your face; is that a part of it?

A. Is it a part of the play?

Q. Is it a part of the production that was held at Fullerton College?

A. Yes. I brought it up over my face.

By the Chairman: **Q.** There's another sentence here from the district attorney's investigator. You're quoted as saying, "I am not sure if the dress was up to the thigh of the actress. I could not see from where I was sitting. And you would have to ask Marion."

A. Yes.

Q. Is this a true quotation?

A. Yes. Well, you see, we're sitting on opposite sides of the stage, and the way I was directed, I was supposed to be staring to the front almost all the way through the whole play, and occasionally I glanced at her, but I would go back and stare straight out to the front. So I would think that an audience would know that better than I.

Q. You state here that only one leg was bare?

A. Yes.

Q. Is that your testimony?

By Dr. Lowrey: **Q.** Mr. Devorak, as an educator or a teacher, you indicated there were five levels of educational value?

A. Yes.

Q. And it seemed to me, and I want you to correct me if I am misstating this case, that most of these were directed to you and the actress and the director?

A. Uh-hum.

Q. In other words, those involved in the play?

A. Uh-hum.

Q. But you are not a student.

A. No, but I don't think you necessarily have to stop education if you are not enrolled in a school. Is that what you mean?

Q. That may be a point, but in terms of this——

A. These were levels of educational material that we did cover.

Q. In this particular instance, you were not a student, so you could not claim that you were deriving educational value as a student. As an individual, that's something else again.

A. Well, that's a technicality. I don't know whether I am considered a student or not. I have not completed my master's, so I think I am a student, but I am not enrolled. I have already stated that.

Q. Now, there were other aspects of it that you indicated might be of value to those who were not participants in the play.

A. Yes.

Q. Now, could these others that I'm referring to now, other educational aspects be gained by reading the play, by discussing the play, as opposed from performing the play?

A. No, I don't think so, because this play is very complex, and I think it takes a lot of study and delving. This is the purpose of an academic study.

Q. Why could you not study this by reading the play and discussing the play?

A. You mean one reading? How do you mean by reading the play?

Q. I mean those persons who were to derive this educational value, why could they not read the play themselves, read the play, and then discuss it in a seminar situation? Could you tell me any crucial area that had to be gained by performing the play?

A. In two areas, performance, obviously directorial and acting-wise——

Q. That's only yourself. I'm talking about——

A. But there are an awful lot of people that are involved in direction and acting. Almost everyone is, as a matter of fact.

Q. You mean in this particular play?

A. No, not in this play, but as audience members.

Q. I'm talking about the play.

A. Yes, but you would learn something from seeing it.

The Chairman: I imagine so.

The Witness: I'm sorry?

The Chairman: I would imagine a person would learn something from watching this play. I appreciate that.

If there are no further questions, thank you for your testimony.

We'll next call another leading participant in the play, Marion Stanek. Miss Stanek, will you raise your right hand.

MARION STANEK,

called as a witness, and being first duly sworn by the chairman, testified as follows:

By the Chairman: Q. Do you have a presentation you would like to make in connection with the investigation?

A. No, I don't.

Q. You were the other participant in the play, taking the place of Harlow in the play?

A. Yes, I was.

Q. Were you or were you not enrolled as a student at the time?

A. No, I was not enrolled.

Q. You were not enrolled as a student?

A. No.

Q. Thank you. Now, do you have any opinion as to the educational value of the play, if any, as received possibly by the other students at the college who participated?

A. I think there is a great educational value in it, as far as I'm concerned, I found a great deal as to both in the field of psychology and sociology, as have already been mentioned.

Q. By the way, I have a note from my administrative assistant that we have a gentleman sitting with you who should be identified.

A. Yes, this is Norman Gordon.

Mr. Gordon: My name is Norman Gordon and I'm an attorney at law.

The Chairman: Norman Gordon, attorney at law, acting for Miss Stanek?

Mr. Gordon: Yes, I have discussed the matter with both the actor and the actress.

The Chairman: Very well, welcome to our hearing here Mr. Gordon. Thank you.

The Chairman: Any members of the committee—

By Senator Kennick: Q. In retrospect, Miss Stanek, would you prefer now that you had not portrayed this part in the play? If you had it to do over again, would you do it again?

A. No, I would not. The reason why is because I'm not pursuing the field of acting. I don't want to be an actress.

Q. Did you think when you accepted this part in the play that it would result in what it has resulted in?

A. No, I did not.

Q. Do you have a suspicion that you might have been misled by people much older than yourself and should have had much better judgment than we expect from you?

A. I did not understand that question.

Q. Do you have a feeling that you might have been misled by people much older than you are who should have portrayed much better judgment than we could expect from you?

A. No.

Q. You think that their judgment was very fine in leading you into this part?

A. They didn't lead me into the part. I willingly accepted.

Q. They suggested that you accept?

A. No.

Q. They prepared the vehicle for you to accept?

A. No, no, they didn't. I willingly accepted to do the role.

Q. You don't think you were ill advised?

A. No, I do not.

By Senator Richardson: Q. Miss Stanek, you stated that there were sociological and psychological things to be gained from this particular play. Could you clarify that a bit? In what manner? How?

A. I can tell you how I approached the play as the character Harlow, and our society has put Harlow as a sex symbol type of thing, a woman who lives in a fantasy world, and we started off—Billy the Kid and Harlow—as two equals, and it was he trying to get me to go to him or that I should try to get him to come to me. It's the same little game that is found in dating with boys and girls. The girl is trying to not do anything that the man says and she goes through all the tricks of a woman of femininity—emotion, crying, flirting, arguing—to get him to come to her, emasculating the man, in other words.

Q. Do you think that this could be projected without the use of the language or do you feel that the language is a very important part of it?

A. The language is because I know for a fact that Harlow did use this language, and it's used because when she does use it, it's the only way, a masculine way for her to get at the man. And he, whenever he used the language, she stopped talking because he was breaking her down. He was getting on her level and she didn't want that.

Q. Well, do you think it could have—well, no, I'll discontinue that line of questioning. Were you a student during this production?

A. No.

Q. You were not?

A. No.

Q. Had you been a student at the college prior to this point?

A. Yes, I graduated in June 1966 from drama.

Q. June of 1966? This performance was put on quite a bit after that?

A. Yes.

By Senator Walsh: Q. Miss Stanek, I'd like to ask you to examine these pictures that were previously introduced into the testimony here and acknowledged by your coactor, which are pictures of the play that was given in the San Francisco area, and naturally, these are with different actors, but it's still a play called *The Beard*. It's simulated copulation, and I would like to ask you if you would look at these and identify these for the purpose of the record, whether the same type of simulation went on in this play, not having having seen the play himself, these photographs are the same area that was portrayed in your part of the play called *The Beard* at Fullerton College.

The Chairman: Sergeant, would you give the pictures to Miss Stanek and her attorney.

The Witness: The pictures are similar, but the actor's head was not as high on my body as it is shown here.

By Senator Walsh: Q. I understand that.

A. And the position of me in the chair is not the same as the actress was.

Q. But the portrayal and the intent of the act was an assumption of what is portrayed there?

A. Yes.

The Chairman: Are there any other questions? Oh, the consultant.

By Dr. Lowery: Q. A very quick one—Miss Stanek, the same kind of question that was asked of Mr. Devorak. You gained, as you indicated a psychological or sociological insight and advantage, but you are a nonstudent. Could you point out any kind of educational advantages that were gained by the portrayal of the play to other than yourself or those involved directly in the play that could not be gained by the individual in reading the play and discussing it in a seminar?

A. Well, I think in the play, drama should be lived and performed, whereas reading the play, you don't get the same meaning or the understanding as you do, I think, if you go to see the play, it's not the same—I've read many plays—then going to see the actual performance, they're not the same. You learn so much by listening to someone, you know, act out the role or the part. He has his own interpretation and just through the interpretation of a certain role, you learn more than just reading it. Because you are using your own ideas. This way, you have another person's ideas.

Q. Then you are saying that the value lies in the way that the play is directed or portrayed as opposed to the text of the play itself?

A. Yes, I think it has a great deal—if this play could have been—well, done to—you know—I'll retract that—I think, especially in this play, that it has to be handled very well in order to make the meaning and the understanding—you know—of the play.

Q. Would it be a vehicle for the educational value?

A. Yes.

Q. Then the question really revolves around whether it was a wise choice of vehicle. You could get the same educational values through a variety of other kinds of plays.

A. I think it was a wise play.

Q. Well, I'm not asking you to make a judgment—

A. Excuse me.

Q. But that is a question, is it not?

A. Yes.

By Senator Schmitz: Q. I'm sorry to be late, but I understand it has already been established that you were not a student at the time of the play?

A. That's correct.

Q. Did you question as to why you—well, let me ask you: Why were you asked to portray it if you were not a student, if this was a drama class—in view of the fact that there were only two students [sic] in the play—you were not a student—the other young man was

not a student either—was it ever brought up—was this ever questioned by, let's say, some of the students as to why two nonstudents were to get this play?

A. No, not that I know of.

Q. Was this ever raised to you or was this question ever brought up? It seems unusual to me that they would use nonstudents when you are putting on a play here. I mean, when there are only two actors for an educational pursuit, and only the director was a student; is that right?

A. Right.

Q. The director was a student and the two actors were not students. Wasn't this ever questioned or did anyone ever bring this up?

A. No, the question never arose.

Q. Is this usual? I just find it—

A. Yes, many time they have asked students from outside, graduates from the college to come in—

Q. But nonstudents in this case were a hundred percent of the cast.

A. Well, the director wasn't, and Wayne is working on his master's. I would be the only one technically not enrolled within the college.

Q. Wayne was the male actor?

A. Yes.

Q. He was not enrolled, but he's working towards his master's, but but he is not enrolled this semester?

A. Right. I graduated from the college, you know, and I have a right to just come back. They asked me to come back and I came back.

Q. Is there any special reason why you were asked to come back to do this?

A. No special reason. I have been going with Terry, the director, for three years, and he asked me if I would like to do the play.

Q. Is there any reason that you might know as to why the male actor was invited?

A. Well, Wayne happens to be a very good friend of Terry and I, and we have worked together in other plays with Terry, and Terry knew the potential of Wayne and myself, and this is why he chose us.

Q. So basically, might I not be correct in saying that you were both helping out the director and he was the one getting the educational value and grades so far as that goes?

A. He is getting the grades. We all learned—I think we all had an educational value experience from it. I don't say that only I did or Wayne did, but all—I learned a great deal from it.

By the Chairman: Just one other question. Were you there or did you have anything to do with or have you any knowledge of the production of *The Dutchman*?

A. Yes, I did. I saw the play.

Q. You saw this production?

A. Yes.

Q. We have a copy of the script here and a summary from it—sergeant, would you give her two copies—give her attorney one—I would ask you first of all if you recall these particular lines from *The Dutchman*. I'll get the script here in a moment and ask you if it is the script of *The Dutchman* that was presented there.

A. Now, this was two years ago when this was performed, and I remember a few of the lines, but I will not stake my life on that it was everything in the play. I don't remember it.

Q. That's quite all right. Would you know who directed the play?

A. Yes, Terry Gordon did.

Q. Do you know what instructor was responsible for this play?

A. Well, you have it listed right here——

Q. Well, that information came to me that Dr. Duerr was the instructor.

A. Yes, I think Dr. Duerr was.

Q. In your opinion, Dr. Duerr was the professor?

A. I believe he was.

Q. But you do know for certain that Terry Gordon was the director?

A. Yes, I do.

Q. And this was put on approximately when?

A. Two years ago. Now, I may be wrong, but approximately I believe so.

Q. You did not participate in this play?

A. No, I did not.

Q. But you did see the production?

A. Yes. I think I was still going to college, as a matter of fact, there.

Q. Do you wish to express any opinion as to the educational value or other values that might have been conferred on these people and participants in the college from the production of this play?

A. No, I don't, because as I said, I don't remember it that well.

By Senator Richardson: **Q.** Have you ever attended any showings at the school on what was referred to as the underground films?

A. No, sir.

Q. You have no knowledge of any of these films being shown on the campus?

A. No.

Senator Walsh: I would like to make an observation. It seems to me that it's less than two years ago you attended and viewed an educational play such as this and you can't remember today too much about it, what benefit was it?

The Witness: It was at the time. I can't remember exactly, you know—in fact, I have seen the movie *The Dutchman* which was around that same time, and so I don't remember it. I thought it had definite educational value at the time. I looked at it as acting and directing-wise.

By Senator Walsh: **Q.** The actual experience of the play, being part of it?

A. Right, what the actors gained from it, what the director—the work going into produce it, the difficulty of the roll——

The Chairman: If there are no further questions, thank you for testifying.

Thank you, counsel, for attending with her.

We were at this time going to bring on Randy Smith to introduce the testimony regarding *The Dutchman* into evidence. It has already been introduced by Miss Stanek and we will not have to bring him on

to do that, but during the lunch hour, we did have some questions as to the background of Mr. Smith, and Randy, would you take the stand again for a moment?

We know that the committee knows Randy's background; consequently, we didn't think it was necessary to bring it out, but if anyone wants it in the evidence, we will be happy to present it.

RANDY SMITH

having been previously called as a witness, and having been previously duly sworn by the chairman, testified further as follows:

By The Chairman: Q. Your name is Randy Smith—what is your address?

A. Mr. Chairman, my name is Randy Smith. I reside at 2066 South Birch Street, Santa Ana. I am working presently as a field representative for State Senator John Schmitz. I'm a student at Cal State Fullerton.

Q. Were you on loan to the committee from Senator Schmitz to do some investigating work for us?

A. Yes, Senator, I was.

Q. And did you do this investigative work to the best of your ability?

A. Yes, this is true.

Q. And you are a student—full time, is this at Cal State Fullerton?

A. Yes.

Q. Thank you very much. This gentleman may have another question. I am trying to be as fair as I can.

The Chairman: What else would you like to know?

Mr. Phillips: Yes, I was wondering what the function of a field representative is and what qualifies a field representative? I do not understand.

The Chairman: I can explain that to you, subject to Senator Schmitz's confirmation. As far as I'm concerned, a Senator is allowed to have——

Senator Kennick: Can we identify the person who is asking?

The Chairman: What is your name, sir.

Mr. Phillips: Marshall Phillips, KWIZ Radio and KGBS Radio.

The Chairman: Normally we don't take questions from the audience, but we're most happy to comply in anything that is obviously as fair and necessary as this. Senators, Congressmen and Assemblymen are allowed certain assistants under the Government Code and under the Rules of the Senate, Assembly and Congress for the purpose of assisting them in their legislative duties. One of the assistants which Senators, at least, are allowed are people called field representatives. We are also allowed people who are called administrative assistants and we are also allowed people called secretaries. The field representative has, generally, I think worked under the direction of the legislator, and when a matter of this type comes up, it's entirely proper and customary and traditional that the field representative investigate matters for the Senate, particularly when the Senator is in Sacra-

mento and not in particularly a good position to investigate himself. Now, that's the background in general. If you want to ask Senator Schmitz a question on this particular man, what qualifies him, this would be up to Senator Schmitz to answer.

Mr. Smith: That would be embarrassing.

The Chairman: What does qualify him? I think that's the question that was asked?

Senator Schmitz: Well, he has a good background. He was formerly student body president of Santa Ana College and has been qualified to follow my orders. That's about it.

The Chairman: Fine. I think that covers it very much.

The Dutchman has been introduced into evidence. You don't need to testify to that. However, I think the rest of the audience didn't get to hear some of the quotes from this, and I think it would be well if you would read us just a few—I don't know that you need to read the whole thing—just read us a few quotes from *The Dutchman*, if you will.

Mr. Smith: Yes, Senator. The play—these are quotations taken from a copy of the play—a transcript was given to me by Dr. Shields of the college. The play was supposedly put on under the direction of Terry Gordon and under the advisorship of Mr. Duerr. I'll just read some quotes from it.

On page 4 the following quote—"Lula: "I was. But only after I'd turned around and saw you staring through the window down in the vicinity of my ass and legs."

"Lula: "Yes. Son of a bitch, get out of the way . . . Ten little niggers sitting on a limb . . . Yes. Come on, Clay. Let's do the Nasty. Rub bellies. Rub bellies."

And then a speech by Clay on page 20. "I'll rip your lousy breasts off" . . . You great big liberated whore! You fuck some black man, and right away you're an expert on black people. What a lotta shit that is. The only thing that you know is that you come if he bangs you hard enough. And that's all. The belly rub? You wanted to do the belly rub? Shit, you don't even know how. You don't know how. That ol' dipty-dip shit you do, rolling your ass like an elephant. That's not my kind of belly rub . . . And don't even understand that Bessie Smith is saying, "Kiss my ass——."

Senator Kennick: I think we get the idea.

The Chairman: Thank you Mr. Smith. If there are no questions from other Members of the Senate, you may be excused.

One other witness, very quickly, to establish evidence as to one of the matters the committee was interested in. I would like to call from the *Santa Ana Register*, Mr. Jim Brock.

JAMES BROCK

called as a witness, and being first duly sworn by the chairman, testified as follows:

By The Chairman: Q. Mr. Brock, you are not a witness to *The Beard*: is this correct?

A. This is true.

Q. You are a reporter for the Santa Ana *Register*?

A. Yes, sir.

Q. Was there a meeting from which you were excluded held on the campus of California State College at Fullerton?

A. Yes, sir. Around November 21st or 22nd—it was a Tuesday—and I, through my contacts with the college, I went on campus and attempted to enter the meeting, and I was excluded. I was told that all outside off-campus press would not be admitted to the meeting.

Attending this meeting were Dr. Langsdorf—let's see, and I saw Dr. Young. I heard later that there were other people involved with the play attending this meeting.

Q. You were not allowed inside the meeting?

A. No, sir, I wasn't.

Q. Were you given any reason for the exclusion?

A. Well, I wasn't given any tangible reason. All I did was just state, "All right, I can't go in," and I just walked away. I pressed the point to a certain point that I was refused admission and I turned around and walked away. Later on, I talked to Nick Chilton, who is the associated student body president and he and I talked about this, and he told me that he had talked with some legal body with the state and said that this was legal to exclude me from this meeting.

I understood that this State Senate meeting was called to discuss the controversy involved in this play and I wanted to report what was going to be discussed about it, and we had—the reason why we were going there was that we had everybody there, and everybody was going to be talking, and that was just the right time and the right place to try to get the story straight, with everybody saying—somebody saying one thing and somebody saying something else, all of a sudden you're changing the story back and forth, and at this one point, I had hoped that I could attend and report what went on and to write a story from the overall viewpoint rather than just interviewing one person at a time.

Q. You were virtually certain in your mind that the meeting concerned a discussion about the play in question, *The Beard*?

A. Yes, sir. Subsequent to that, that refusal of admission, I observed a story in the campus newspaper, *The Titan Times*, written by—I discovered later—written by Paul Attner. I assumed that this story was taken from the meeting. He attended the meeting. He is a paid publicist by the associated student body and also works, covers the student body for the student newspaper.

Is there anything else?

The Chairman: Any senators have any questions about this? I'll have one more question.

By the Chairman: **Q.** In your connection with other reporters in the newspaper field, have you heard reports of any other reporters about them having been barred from events on the campus?

A. Well, to give you just a little background—I'll be very short—I have been covering the college for about four years, and this was the first time I have ever been excluded from anything on campus that

I knew about. I didn't know about *The Beard* so I couldn't be excluded from it. But this was the first time and it was—well, I had set up a working relationship with the college, and you get to know people and work with people, and there's a lot of cooperation, and then all of a sudden at that one point, there was an ending of this working relationship. And I felt like I was the aggressor going in and pounding on the table—which I was—but I had to do a job.

Talking to other reporters, I don't speak with them all. They can speak for themselves, but they have had similar experiences too, but other than that, during this past year—in the year '66-'67, there was some difficulty in press relations on campus getting news about the campus goings on, but this year it has cleared up and there seems to be more of a rapport between the campus and the outside community.

My main question of the people in the drama department was: why three performances and not just one, and every time I ask that, it was sort of—well, they shrugged their shoulders.

Q. You were unable to obtain this information for your paper?

A. Well, they would tell me, but I wasn't satisfied, personally.

By Senator Schmitz: Q. When you say this was Paul Adler, A-d-l-e-r?

A. Attner, A-t-t-n-e-r.

The Chairman: Any questions from any of the other senators? Thank you very much.

We have now, ladies and gentlemen, before the committee the instance of the performance of *The Beard*, the instance of the performance of *The Dutchman*, the instance that was introduced just before lunch, the sale of the *Free Press* from the stands on the Fullerton campus, and one instance at least of a newspaper reporter being barred from the campus in connection with this performance of *The Beard*.

I think the opinions of the committee, as expressed to me during the lunch hour, is that perhaps we have had sufficient testimony to introduce all of the items in question in evidence. During the lunch hour then, it was suggested that we have several of the people from the administration of the college up to discuss this with us and perhaps make a presentation and answer questions.

It had been the committee's intention to call Dr. Langsdorf later on in the program, the president of the college, in order that Dr. Langsdorf would have access to all of the events and perhaps would be in the best possible position to speak, as the president of the college, for the college. However, during the noon lunch hour, Dr. Langsdorf requested that he be put on as soon as possible. As a courtesy to Dr. Langsdorf, if you would come forward, Doctor.

We will have Dr. Langsdorf make his presentation. Dr. Langsdorf has agreed to make himself available for questions after other witnesses come on.

If you would, Dr. Langsdorf, may I ask you to be sworn first of all. If you would, as soon as you are sworn, make your presentation and then after that we have some other people from the college, and I know the committee will have some questions for you, and if you could make it as brief as possible.

DR. WILLIAM B. LANGSDORF,

called as a witness, and being first duly sworn by the chairman, testifies as follows:

The Chairman: Dr. William Langsdorf, President of the State College at Fullerton. Would you identify the gentleman with you, Dr. Langsdorf?

Mr. Duesenbrenner: Yes, sir, I'm Richard Duesenbrenner, attorney for the California State Colleges.

The Chairman: Fine, welcome to the counsel table.

Dr. Langsdorf.

The Witness: Thank you very much. I may take just a few minutes longer than five because I thought it might be of value for me to review my own investigation in this first. I will make it as short as possible.

The Chairman: I know the committee will be interested in that.

The Witness: Mr. Chairman, honorable Senators and gentlemen: [Langsdorf Statement—Appendix II.]

Mr. Chairman, I have here the signed affidavits of 77 persons who were there. They are all identical. I will read one.

"I hereby state that I was in the audience on the night of November 8—and several of these are the 9th—the two performances on the 9th—the performance of the play "The Beard" in the arena theater at California State College, Fullerton. In my opinion, the actor and the actress in the play were decently clothed at all times. Furthermore, I wish state unequivocally that no actual sexual intercourse, perverted or otherwise, occurred in the performance. I certify under the penalty of perjury, that the foregoing is correct."

And there are 77 of those.

The Chairman: Would you care to have those introduced into evidence?

The Witness: Yes.

The Chairman: Sergeant, if there's no objection on the part of the committee, it will be introduced as part of the transcript—no objection? So ordered.

The Witness: Thank you.

The Chairman: Thank you for your statement, Dr. Langsdorf. Will you please remain available under your subpoena for some questions at a later time.

The Witness: I will.

The Chairman: Senator Schmitz may have a question now.

Senator Schmitz: No, I wanted to comment—

The Chairman: He's coming back later.

Senator Schmitz: In the wake of the applause, I would just like to comment that I thought it was a very good presentation too, but I think there's one thing that should be put in proper focus here, and it's the same thing I pointed out to Chancellor Dumke: When you compare medicine and law, you are talking about people who pay their own fare which is part of the area of education also.

The Chairman: I'm sorry, but I will have to ask the audience, as much as I appreciate your enthusiasm on both sides, if you will confine it, I'll appreciate it.

Senator Schmitz: My point is that when you talk about restrictive legislation, we must keep in mind that we wouldn't have to pass any positive restrictive legislation at all, but if we failed to pass one very important piece of legislation—namely, the appropriations—the courts could do nothing about that.

Dr. Langsdorf: We recognize that.

Senator Schmitz: This is what we're talking about. We're not talking about restrictive legislation. We just wonder if the taxpayers in this district, in our state, really feel that this is what they want their money to go to. We are not talking—at least I am not talking in terms of restrictive legislation, because I think many of the points you have brought out are very well, but I think they can be applied best to private education, and when you go into tax-supported education, you bring in an entirely new ingredient, which is another court tradition, and decision which is that whenever you pay the money, the power to control goes along with paying the money.

The Chairman: Dr. Langsdorf, if you will keep yourself in readiness for any questions.

The committee has asked that we move right along in view of the number of witnesses that we have, and at this time, we will call Dr. Duerr, whose class it was that put the performance on. Dr. Duerr? Would you raise your right hand and be sworn.

MR. EDWIN DUERR,

called as a witness, and being first duly sworn by the chairman, testified as follows:

The Chairman: Would you identify yourself?

Mr. Sklar: My name is Sklar, S-k-l-a-r, attorney at law.

The Chairman: Dr. Duerr, just to put this investigation in proper focus, you were the instructor in the class that put on *The Beard*; is that correct?

A. That's correct.

Q. And you were the instructor in the class that put on *The Dutchman*?

A. That's correct.

Q. And both plays were directed by a student director?

A. That's correct.

Q. Did you have a statement now that you wanted to make? I think some of the members of the committee will have some questions, but I thought perhaps you'd like to make a statement.

Witness: No, I'm just very happy to come here and answer all your questions to the best of my ability.

The Chairman: You have no statement to make officially?

The Witness: No.

By Senator Schmitz: Q. Dr. Duerr—

A. May I correct that—it's not doctor.

Q. Mr. Duerr, you did state that you were the instructor when Terry Gordon presented *The Dutchman* also?

A. That's right.

Q. Now, Dr. Langsdorf pointed out that in the school, it is a practice that each student direct two plays, and it was also pointed out that Terry Gordon, the student, selected *The Beard*. Might we then assume or could you tell me did you then choose *The Dutchman* for him to present?

A. No, I did not choose *The Dutchman* for him to present. This, again, was the student's choice.

Q. In other words, the student chose both plays, *The Dutchman* and *The Beard*?

A. As I remember, *The Beard*, I'm positive about. The other one was two and a half years ago or two years ago. I'm almost sure that he chose that one.

Q. In other words, this was then contrary to the policy of the school that the student select one and the instructor select the other?

A. Not contrary, these were different years.

Q. Oh, I see, it's each semester—

A. Each semester, each student does one play that I assign him or very strongly suggest to him—knowing what he can do—in order to self-motivate—anything you're interested in—I allow them to pick one play. I do not say, "You cannot do it because I don't like it."

Q. Do you recall which play you did assign this semester?

A. This semester? No. This other play, he didn't do. This controversy upset everything. He didn't do his other play. The one he was supposed to do, he never got around to doing. He just couldn't do it.

By Senator Richardson: Q. Mr. Duerr, how long have you been teaching at Fullerton State College?

A. This is the middle of my—at Fullerton?

Q. How long have you been teaching? Let me put it that way.

A. I have been teaching since 1927.

Q. All of your teaching has been in the area of dramatics?

A. Entirely. My degrees are in drama, as my interests. I have worked 20 years in the professional field in drama in New York City. I have 22 years in the academic field and 20 in the professional field.

Q. How long have you been teaching in the State of California?

A. Well, I taught, roughly, 13 years in the University of California at Berkeley—four years as a student and nine years as a director of a little theater there.

Q. How long, sir?

A. Four years as a student at Berkeley in drama and nine years as a director at the University of California, a little theater.

Q. It's been brought to my attention that you received your tenure, I believe, right during the heart of this controversy. Would that be a fair statement—at Fullerton?

A. Yes, because there is a date every year—I think it's December 1st—in which tenure has to be decided or not. It had nothing to do with the controversy.

Q. And yours was decided right during that period?

A. December 1st is the date. If you are not notified at the end of three years that they will not retain you, you get tenure. Nothing has to happen. If they don't intend to keep you, they send you a notice by December 1st. This goes on every year—same date.

Q. In other words, you do have your tenure now?

A. I do. I'm very happy. I like Fullerton. I like the community I'm in.

Q. How many students do you teach during the week? How many students do you have?

A. All my classes?

Q. Yes.

A. I would guess in the neighborhood of 100 or 110—right in there. I have three classes plus a rehearsal-performance class—four classes all in all.

By Senator Schmitz: Q. Mr. Duerr, what educational value did you feel this play was going to bring forth?

A. Well, yes, I think there has been some confusion. This is a course in directing. We have other courses in acting. Do you follow me there?

Q. Right. That would account for the fact that they were non-students?

A. Yes, they get no credit, the actors get no credit for being in the play. The directors get credit. The primary course, the primary benefit from doing *The Beard* is to do a different kind of play, a poetic play. To do the kind of play that is in the mainstream that American drama—not a 1910 play. Those are the values.

Also, this play has a great many technical problems. If you have read it, you know the constant repetition. It's not realistic at all. It's a poetic play.

Q. What is your definition of mainstream?

A. Well, I would say the plays that are being done in the theater in this country and this world today are mainstream.

Q. Would it include plays that have had the police close them up and then are being appealed in court and so forth?

A. Yes.

Q. This would be part of the mainstream?

A. Yes. These are being written today by men living today writing about today's problems.

Q. What plays would not be in the mainstream then?

A. All kinds of plays are in the mainstream, not one kind.

Q. You mean plays that were written years ago—any play written today would be in the mainstream?

A. I mean a play written today about desegregation or something would not have been written 10 years ago, 12 years ago maybe. That's in the mainstream today.

Q. But is your definition of mainstream a play that is written today about today's problems?

A. Yes.

Q. Any play?

A. The plays that are on our scene—done in New York or in community theaters or by original playwrights—plays that are published—that's the mainstream of drama today, in my opinion.

Q. Regardless of the circumstances surrounding the presentation of these plays?

A. I don't quite get the meaning—

Q. Well, you're familiar with the history of this play, its showing in San Francisco——

A. Oh, yes.

Q. And the police problems——

A. Yes, and hundreds of performances in New York City.

Q. It's still under appeal—isn't that true—the showing up in San Francisco is still under appeal?

A. It seems to me, because I went into this before I did the play—I will not let any student do, in many ways, an illegal play.

Q. Well, the fact that it is under appeal, you don't know what the final court decision will be, whether it's illegal or not?

A. Well they let it run how many weeks—a year or two in San Francisco. They could have taken other tacks if they wanted to. I think it has been dropped, in my opinion, and also it ran a hundred performances in New York. No action whatsoever was taken. It was mailed through the mails to every home or homes and campuses in magazines. They stopped other magazines that are obscene.

Q. I am personally not concerned as to the illegality, because courts being what they are, this is a very restrictive area, but I don't think it's a debatable point. I think the court tendency is on your side as to the illegality of this book.

A. That's my only basis for not doing a play.

Q. But after it was done—and Dr. Langsdorf stated there were members of the press in the audience—and it was felt it was a mistake. Do you feel it was a mistake that it was put on or do you feel that it was a mistake that there were reporters present in the audience?

A. It was a mistake that I gave out the permissions, as I call them—not tickets—in such a way that people got in who were——

Q. But you don't feel it was a mistake to put the play on?

A. No, not at all.

Q. It was a mistake that there were outsiders——

A. Yes, I don't want to embarrass this community; my community; you people; anybody. That's not the point of the class.

Q. But do you think the community has a right to know how its dollars are being spent?

A. Of course. This no secret—ever a secret.

Q. Then don't you think it is proper then that periodically reporters go in to see how our dollars are being spent?

A. All our plays, if they come and talk to me and I told them what kind of play it was, they're welcome.

Q. Well then why do you feel it's so bad that people——

A. Now this play—if I could make it this way—as simple as I can. This play, after I read it, I thought I would not I think take my mother, my sister or you to it.

Q. If you had invited me, I wouldn't go.

A. I mean—what I'm trying to say is that I would not take anybody that I knew to a play in which they didn't know what kind of play it was. You could do Hamlet or other plays or *The Man Who Came to Dinner*—people know. This is a new play and I know that people don't like this kind of play. If my mother knew about this play and wanted to go to it, I wouldn't object to her going or you or anybody.

Q. Do you think that more of the taxpayers who foot the bill for the upkeep of the college are more inclined your way or my way with regard to this play.

A. You mean here?

Q. In other words, you said you wouldn't take me to the play because you said you knew I wouldn't like it.

A. No, no, I said you didn't know what kind of play it was that I was taking you to. If I could explain to you what kind of play it was, then you could come.

Q. Would you explain to me what kind of play it is?

A. Yes, it's a very frank play.

Q. I read it—it's that.

A. Yes, that's what I would tell you. You are likely to be shocked—this is what I said to people—it's a fairly frank play. It's quite a strong play, in other words. And if you don't like that kind of play, please don't come because you won't understand that we are trying to experiment. We cannot judge a play—what I teach in directing is that we cannot make a value judgment or a correct judgment of any play in print. I teach my students that you can only judge a play—you must see it acted?

Q. Do you think the taxpayers should be asked to subsidize the type of education in which this type of play is taught?

A. If it does what the play tried to do, yes, I think they would be very happy.

Q. You think the taxpayers would be happy to do it?

A. Yes, if I could talk to them.

Q. If you could explain to them—

A. If I could explain to them what this play does, yes.

By Senator Walsh: Q. On that last remark, where you say, "Please don't come to the play," we have evidence of various numbers and many, many people that write letters to us complaining, "Please don't spend our tax dollars like this," or, "Please don't give them the authority or let them spend our tax dollars this way."

I think this is the crux or the point of Senator Schmitz's remark there or his question. The majority of the people in the State of California, through communications to their legislators, do not want this type of drama, whether you personally, as a professional in this field, want to conduct different plays like this, the majority of the people pick up the tabs and do not want this type—and through communications, verified communications, they do not want this type of drama portrayed in their tax-supported institutes and they're paying the tab on it. That's the reason for this hearing.

A. I agree with those people completely, but I think that they have been misformed about the play.

Q. Well your opinion about how they are informed is not of consequence here. They're paying the tax bills here and they are the ones that are entitled to direct or at least have direction on how this money is spent.

By Senator Schmitz: Q. Mr. Duerr, would you like to run a political campaign against me making this the only issue?

A. I'd have to think about it.

Q. I'd love to have it.

A. I'd have to think about it.

Q. I would love to have that. I would love to have this as the only issue in running for reelection. You see, you don't have to run for reelection.

A. I run for reelection in a sense every year.

Q. But you've got tenure now.

A. But my peers even now can—

Q. But you've got tenure now, and you got it December 1st after the November 8th and 9th play.

A. That had no relation to *The Beard*.

The Chairman: I find the discussion getting a bit far afield. Just one second—were you through, Senator Walsh?

Senator Walsh: Yes.

The Chairman: Senator Kennick.

By Senator Kennick: Mr. Duerr, in following up Senator Schmitz's suggestion that he be allowed to attend this play, you said that you would have no objection to people attending it if you could explain to them what this play is and what it does.

A. That's exactly right.

Q. Most of us are very ordinary people. When we get in proximity to plays of this sort, it's like getting close to fantasyland over here. We don't quite know where we are. Will you tell me what the benefits of the play are? What would you have said to me if you wanted me to attend this play? How would you explain the value?

A. I think I would say it is saying—this is only my interpretation—I think different people interpret plays differently—you would interpret *Les Miserables*—as I say it, as the student gave me his rationale in wanting to direct the play—I made him go into it in detail—"If you just want to shock the community; if you just want to be smart, you can't do this play. You must have—"

And his reasons were—and I agree with them—that somehow—and this hearing may be a demonstration of this fact—that we have an obsession with sex. Our society has an obsession with sex. And I think some of us who are over 24 are more obsessed with it than the students. Do you follow me, sir? And this is what this man is trying to say, Let's not make sex guilty. It is a normal, human act like eating or swimming."

In other words, what hangup does America have about sex? I think in the longrun I could do more to end dropouts, to end all these things that are happening if people could face these things and not make them guilty. That's what the playwright is trying to do.

Q. Could he not approach it with different words? Why the necessity of these words?

A. Well, that's his decision. I mean, he's the playwright. I wouldn't change his words.

Q. You wouldn't change them?

A. No, I wouldn't change any playwright's work. I wouldn't change your speech. I wouldn't change it.

Q. When you look back now, do you still believe that this was a very wise thing for you to suggest being done?

A. I didn't suggest it be done.

Q. Who did?

A. The student. I already said that. The student, it was his choice.

Q. But you gave him his choice?

A. I do this with every student. We give a student a choice of what term paper he will write.

Q. You had nothing to do with this at all?

A. I did not suggest this to him or assign it to him. That must be on the record.

The Chairman: You're correct, sir. It is on record.

The Witness: I allowed him to do it.

By Senator Kennick: Q. But a student comes to you and says, "Mr. Duerr, may I put on a play?"

You say, "Yes, anything you want."

A. No, I read it first.

Q. Well, what did you tell him after you read it?

A. I wanted to know why he wanted to put it on.

Q. And what did he say?

A. He had many reasons. Number one was, he was a director—he's a very good director—and he had seen the play—I hate to repeat—in San Francisco and thought it was badly directed, number one. In directing, we are interested in two areas—what you see on the stage or what you hear on the stage. That's why you can't get these—

Q. After he discussed these things with you, did you finally say, "Okay, go ahead?"

A. I say, "Okay," but in this one particular case, this play is not known by the public, I don't want to offer it to the public. As a class, we want to make an evaluation, but we can't evaluate it on paper. I will explain to people who wish to come what it is, and if they don't wish to come, that's fine. I did this very carefully, but it didn't work.

Q. It didn't work out that way?

A. Somebody gave this to the press. There was something diabolical going on here.

The Chairman: Ladies and gentlemen, we have to change the recorder.

(Recess.)

The Chairman: Ladies and gentlemen, in the interest of time, I would like to ask Mr. Duerr to stay where he is, but I would like to call—which witness was it that was subpoenaed at the request of the college that wanted to make some change in his testimony? Is this you, sir? Would you come forward, and while this gentleman is coming forward, the committee will excuse the following witnesses. May I first have your name, sir?

Mr. Willis: Willis.

The Chairman: May I say that the committee has subpoenaed a number of witnesses at the request of the administration of the college, and the administration of the college has agreed with the committee that much of the testimony is repetitive and cumulative testimony, as we call it in court, each witness saying the same thing, and in the interest of time, it was suggested and is okay with the administration if we excuse certain of their eyewitnesses—Dr. Roger Dittman, Mr.

William J. Goff, Dr. Daniel Gordon, Dr. Gene A. Hagle and Mr. Morris Glasser, so those five witnesses may consider themselves excused for the balance of the hearing. If there's any question about those names, I will read them again. Roger Dittman, William Goff, Daniel Gordon, Gene Hagle, and Morris Glasser. These people are excused for the balance of the hearing at the request of the college and with the concurrence of the committee.

One witness, Dr. W. Van Willis, has stated that perhaps his testimony, as reflected by the record, may not be correct. The committee has decided to give him a chance to alter or change or correct his testimony so that it will reflect his proper views.

Dr. Willis, I'm not—Mr. Charles Leonard Ford is also excused from appearance. At the request of the college.

Dr. Van Willis, I'm not sure which areas your testimony was not reflected correctly in.

Dr. Willis: I believe it was an inadvertent mixup in names on my part. I believe the question from you, Senator Whetmore, was, "Did my testimony corroborate that of the first eyewitness to speak, Mr. Drake, of the *Yorba Linda Star*?" And I want to indicate that my testimony should corroborate that of Mr. Ford. And to clarify that point, I meant for the record to indicate that my testimony as an eyewitness would corroborate Mr. Ford's.

The Chairman: Thank you. Are there any questions from the Senators of Dr. Willis while he's on the stand?

Senator Schmitz: We all assumed he meant that anyway.

The Chairman: If there are no further questions, Dr. Willis, you may consider yourself excused from the balance of the hearing.

Continuing now with Mr. Duerr's testimony. Senator Kennick has some questions he would like to ask.

By Senator Kennick: Q. I think, Mr. Duerr, that we had arrived at the conclusion that the young man who directed the play selected the play?

A. That's correct.

Q. This is a privilege that a student director has of selecting a play?

A. Just as a student has the right to choose the topic of a term paper.

Q. May I clear up this point—what percentage of students are registered in the college?

A. All the students in the class are registered.

Q. What percentage take part in the plays?

A. That is different. People who take parts in the plays are not in class at all. They volunteer. They don't get credit for being in the play at all.

Q. This is a class in directing?

A. In directing.

Q. So if you're going to hire an actor or an actress, you must go outside the campus to get one, right?

A. Not necessarily. We have open trials for all our plays which are open to all members of the drama department and all members of the college—and we hope, because we like to cooperate with the community—any member of the community. That's been our policy for three or four years.

Q. Now, if you conduct a class for training of directors, in very simple terms, why isn't it much easier and a little better judgment to train them in plays acceptable by the majority of the people instead of training them in plays that are completely upsetting to the community?

A. I'm not sure the play was completely upsetting to the community. The fact sheet is not always accurate.

Q. Do you think if the community had had knowledge of this, it would have been upset?

A. I don't know quite what you mean by that question, sir.

Q. If the community had had knowledge that you were putting on this play, the newspaper had announced it and the newspaper had run a couple of paragraphs with the dialogue, do you think the community might have been upset?

A. I'm not sure being upset is wrong. Plays should upset people. That's one of the prerogatives of a play, one of the rights of a play, to shake people up.

Q. You fellows live in a world that is a strange one to me.

A. We live in today's world only.

Q. It's a very, very strange world.

A. It's today's world.

Q. How much did it cost to put this play on?

A. Nothing.

Q. Did you pay anything for the rights of the use of the play?

A. When we do plays for the public, we do. Inside the class, during class hours, legally we're not required to. Now, for the public, if we did a public performance, we must.

Q. It cost nothing other than your salary and time?

A. The normal class.

Q. If your students are going to select the plays——

A. Not all plays.

Q. Well, two a semester or——

A. Half of them.

Q. But especially *The Dutchman* and *The Beard*, it would seem to me—now, some of us are violently opposed to the charging of tuition at state colleges, but I'm not too sure that maybe if some people are going to select this type of play——

A. Well, Senator, are you sure of your judgment of those two plays?

Q. No, I'm not sure of anything after talking to you educators.

A. You said you didn't know much about drama.

Q. I don't.

A. And yet you're making judgments about drama.

Q. I don't know anything about drama, but I know a certain amount of dirt when I see it.

A. Well, that could be in the mind of the beholder.

Q. Could be.

Do you think that your judgment in this matter was strictly good?

A. I'll rest my 40 years experience on my judgment in this case.

Q. You finally agreed with your student director that this was a fit play to go ahead and put on?

A. Unquestionably.

Q. I've fought for your salary increases for 10 years. I'm not too sure I'm right.

A. Could I ask a question? I mean, I would like to point out something. If somehow——

The Chairman: Ask the question through the chair, if you would.

The Witness: If we in the college, in the classroom—remember this is not a public performance—but in a classroom have to have our plays picked for us, in essence——

Senator Kennick: No one's saying that.

A. You're implying that. If you don't like it——

Q. No one's implying any such thing.

A. I don't know what you mean.

Q. We all recognize green or yellow—at least we should.

A. This is not that simple in this case.

Q. You've made it that unsimple, that's an absolute cinch.

A. I didn't make it. It just isn't simple.

Q. You show that play to a 100 people on the street, and 99 out of the 100 will say, "What in the devil are you doing?"

A. Well, I would have to show them the play. I wouldn't let them read it. That's not the way to judge this. You're judging it by reading it, sir.

Q. All right, you win.

By Senator Richardson: **Q.** Several questions—first of all, were minors present at these performances?

A. Not that I know of. Permissions were not given to one single minor.

Q. So nobody was there under the age of 21?

A. Not too—well, I don't know. I can't be sure. I don't think so.

Q. You don't think so. In other words, you don't know for sure?

A. We don't make that rule. You don't have to be over 21 to attend a class.

Q. I'm talking about this performance, I'm not talking about your class.

A. This is part of the class.

Q. In other words, you have students then who are under the age of 21?

A. I don't think in my class, but they might have come to class. I don't think so. I couldn't swear to that.

Q. In other words, you don't know. There could have been youngsters there under the age of 21? That's a simple statement——

A. Well, I don't know. I didn't ask each one, but I don't think so.

Q. I just asked you if there could have been.

A. There could have been.

Q. That's all I wanted to get out of you first of all.

Secondly, what if some other director you're teaching comes up to you in six months from now and says, "Sir, I would like to also present this play because I believe I could do a better job of it and it would be challenging to me." What would be your decision?

A. Knowing the furor it has caused and the anxiety on your parts, I would say no, obviously.

Q. But if there hadn't been a furor, there's no question that you would?

A. No question at all.

Senator Kennick: If you think there was any anxiety on my part, you're making a mistake—that's for sure.

By Senator Richardson: **Q.** Now, let me ask you this question: Getting back to the mainstream, you have pretty well stated that the mainstream play is written about something that is happening today, and obviously sodomy is something that is going on today and has for quite a number of years, what if a student comes to you with a play written on sodomy and asks to present this play? Would you, in fact, allow him if it were well written and he wanted to do it?

A. I would have to wait until I read the play and made a judgment in that respect.

Q. But if you felt the play was good?

A. If I felt the play had redeeming social merit and not addressed to prurient interests, I would say yes.

Q. Well then on your judgment you would allow that to happen?

A. On that basis, I would.

By Senator Schmitz: **Q.** I may not have recalled the testimony properly, Mr. Duerr, but it seems to me—and Dr. Langsdorf may correct me on this—but that Dr. Langsdorf stated earlier that when he talked to you, that you indicated that it was a bad play. Am I correct in that?

Dr. Langsdorf: I said he said it was a poor play.

By Senator Schmitz: **Q.** Now you seem to indicate that it was a good play, except it was found out by the community and——

A. There's a little difference of words there. I know what my president thought I meant, but I said in class, "I do not particularly like this play, Mr. Gordon, when I first read it. I, myself, would not do this kind of play."

Q. Did you call it a poor play or——

A. No, that's not one of my phrases. I didn't see any great—I had no enthusiasm for the play, myself.

Q. You did see socially redeeming significance in it?

A. Well, I saw that there, but this kind of a play, I never personally would do this. There are other plays that I would personally not do, but that doesn't mean that they're bad plays or that they shouldn't be done. You have certain likes, but this didn't interest me particularly.

Q. One other question here—maybe you've already clarified it—but your statement right prior to the break, you said, "There's something diabolical about the way these tickets got out." This seems to be something that is drawing very clear, that the problem with many of the people such as yourself is not that the play was a bad play, but that the community found out about it and the community doesn't understand these things; am I correct in summarizing things that way?

A. I think the community and some of the press things distorted facts.

Q. If my political opponents only understood me, I wouldn't get those 40 percent of the vote against me.

A. That's why I said I had to explain the play to people. This is a new kind of play. It's very difficult to understand this play.

Q. One other question—and rather than call Mrs. Stanek back up here, and maybe you can't answer this—but she was not a student, as we have found out; she was a friend of the director. Are you aware of what her employment is outside or maybe you wouldn't want to answer that. Maybe we should call her back up here. In other words, we didn't ask her what she does outside.

A. I'm not quite sure.

Q. Is she an actress?

A. Not now, I don't think.

The Chairman: We'll have an opportunity to call her back.

By Senator Richardson: **Q.** Frankly, why were three performances put on instead of one?

A. Whenever we get a chance when we can get the hall—we don't have enough room—we like to put any one-act play we do on two or three times in order to give the actors more experience. One performance is not enough. These people rehearse six weeks and it's all over in one night. We can't always do it because we have other scheduled things. If there's a chance to do it twice—

Q. But I thought it was the directors—the actors are just—

A. Volunteers.

Q. Volunteers. How many of these hundred and ten students or hundred and some students are in your directing class?

A. My directing class has 16 in it. There's another fundamental or elementary class that has—I'm guessing—20.

Q. Do they put on plays, too

A. No, the first year they do exercises. This is the advanced class.

Q. Of these 16 that put on plays, do they each put on two plays a semester, and do you put them all on—

A. Or the equivalent. Sometimes when they're very new, you have to assist one director. I can't do 32 plays. I can only do about 20.

Q. Well, what I'm getting at—32 times three—you put all your plays on three times?

A. No, some once, some twice—

Q. How many this semester got three showings?

A. One just done last weekend. We had a Friday, Saturday matinee and a Saturday night.

Q. Any done before *The Beard* was done have three showings?

A. It's very easy to dig up. I can't remember, but I'm sure so, oh, yes. Some were four, too.

By Senator Richardson: **Q.** How many times did you show *The Dutchman*?

A. Once only because that was done at noontime.

Q. How many of your students saw the production?

A. You mean of the directing class, the 16 pupils?

Q. Yes.

A. I think everyone, I would guess, because we usually discuss these plays as part of the assignment to see how the other directors direct, and we usually spend next week an hour or two discussing the direction of that play.

Q. Were they given credit for attending?

A. I don't take attendance at the plays.

Q. How many of your students that attended are under 21?

A. None.

By the Chairman: Q. I have just four quick questions here—just to clarify your testimony, I understand that you signed all of the tickets or passes or admission slips—whatever you want to call them—is it true that you signed over 300 of these?

A. I signed what the hall would hold. That's why I signed them and numbered them because we can only seat 120 a night. I had to keep very careful track, and I only signed for two performances. We didn't know we were going to do the third one at all.

Q. According to Dr. Young's statement, printed statement, over 300 persons attended?

A. These figures he got from me. I have a record of every play we do. I have a record of how many attended.

Q. It is true that you signed a pass or ticket for each person that had a pass or ticket?

A. Except for several—four or five members of the faculty whom I knew, I let them in.

Q. Going to a point in your testimony—in your opinion, the play *The Beard* is in the mainstream of drama?

A. That's correct.

Q. Would you say also that *The Dutchman* is in the mainstream?

A. Yes, because it dealt with the problem of black and white.

Q. You said that you would not take your mother or your sister to the play?

A. I wouldn't take her there, her not knowing what kind of play it was. If she knew what kind of play it was and wanted to come, I'd gladly take her.

Q. But in spite of the fact that you said you wouldn't take your mother or sister to the play, you did expose the youngsters in the college to it; is that correct?

A. But I explained exactly to them what I would explain to my mother or sister. That's why I talked to them and gave them the slips.

Q. To all 301?

A. Absolutely, unless they gave the tickets to somebody else.

By Senator Richardson: Q. You state that there is an obsession in this country today towards sex. Do you think that plays like this help create that obsession?

A. No, I'm sure the author and all of us concerned are hoping to break through that guilty feeling and try to dissipate that feeling.

Q. In other words, you think we have an extremely unhealthy attitude towards sex in this country today?

A. Yes, I do. I might add that in the discussion of this play, one of the professors thought that this play was not run in any other country. It's a peculiar American phenomenon. It's a hangup with sex that we have. We think sex is guilty. No other country feels that.

Q. In other words, you do not consider that play vulgar?

A. Oh, not at all, not at all.

By the Chairman: Q. You stated that the play typifies a normal human act such as eating, sleeping or swimming, I believe you said.

A. I say sex is a normal human act.

Q. Do you consider oral copulation a normal human act, the same as eating or sleeping?

A. It's a part of sex, and if it's a part of sex, yes.

Q. Your answer to that question is yes?

A. Yes.

Q. Is it true that the director received an A for the production of the direction?

A. We haven't given out grades yet in the course. That comes in another week.

Q. Do you have any idea what his grade might be?

A. No, I have a couple of more plays that I have to judge them all in relation to the others.

Q. Was his direction of it satisfactory in your opinion?

A. Excellent, more than satisfactory.

By Senator Richardson: Q. Do you know that oral copulation in the State of California is a felony?

A. I know that. This is a good point. Murder is a crime too.

Q. I just asked you: Do you know it's a felony?

A. Yes.

By Senator Schmitz: Q. One question—earlier, Chancellor Dumke had stated that perhaps this was a study of a disease. Now, according to your testimony, the disease is our hangup on sex?

A. That's right.

Q. Not the over emphasis on this type of sex? In other words, what I gather from Chancellor Dumke was that this type of a showing of this play was the disease, but I may have been misinterpreting, but I think most people would have gotten that from Chancellor Dumke's testimony that he felt that there was moral decay and he was talking about the decline of civilization, and therefore this might have been a critical analysis of the moral decay, but your idea is that this is something good if we can only break through this hangup? Am I correct in this?

A. It's healthy. It would make everybody healthier and freer.

Q. So that you will say then that the reason for showing this play was not to analyze the type of play, it was to—excuse me—it was not to analyze what quaint old folks like me would call the moral decay, as depicted by this play, it was not to study this disease, but to study the disease of people like me who have hangups of this type?

A. Not exactly. I think that it's what one individual sees in society, one person's interpretation of society.

Q. But you do not think that the showing of this play is an indication of a disease?

A. Oh, not at all.

By Senator Walsh: Q. I have just one question. In reference to President Langsdorf's testimony, in which he stated that both Mr. Duerr and Dr. Young, chairman of the drama department, were very surprised to learn that members of the press had been in the audience, and both stated that a mistake had been made which would not be repeated.

Were you referring to a mistake of the press getting in or a mistake of the play going on?

A. I was referring to the way the tickets or the permissions were distributed.

Q. It had nothing to do with the play?

A. Not at all, in my mind, in my province.

The Chairman: The consultant has a question.

By Mr. Foley: Q. Mr. Duerr, if I correctly recall, Chancellor Dumke thought the play was rather trash, where you think it has real value; is that correct?

A. I'm not sure it has real value. I have the feeling that in about five or six years that it will become a very significant play. You can't tell yet. We may be breaking through certain standards. I don't know yet.

Q. The reason that I asked is because the thrust of Chancellor Dumke's statement—and I would gather Dr. Langsdorf's—though you can correct me—that the academic community should be the judges, that I want to point out that the academic community apparently is not in agreement—at least, in this particular case.

Now, the second question: What was the purpose of the panel after the first performance?

A. Because this was what we call a new kind of play and a fairly frank play, and we, in class, as directors beyond teaching people to direct, want to know what an audience thinks of this kind of play. They might find it entirely boring. I think half the audience found it boring and half found social significance. We didn't have judgment imposed on us by the state.

Q. Then in effect what you are saying is that in your judgment there were two reasons for giving the play——

A. Many reasons, many reasons.

Q. One was your class in directing?

A. And helping the actors.

Q. But that wasn't in your class?

A. That's a corollary to the course.

Q. It could be——

A. Very excellent.

Q. But it would not necessarily follow in the course of study to the corollary.

The other thing was the value that you thought would accrue to the audience and apparently would be told by this panel.

A. It would help a person in philosophy and a person in psychology particularly, because this play is in that realm.

Q. The question I am trying to get to, Mr. Duerr, is that if the academic community is to make a judgment, and you are an expert in drama, but you are also now making a judgment on sociology, philosophy and those subjects—a wide area, and I just want to make clear that this is your intent?

A. No, I'm not an expert in those fields.

Q. But you are presenting information which you feel would be of value——

A. There isn't a play written that doesn't have some philosophy in it.

Q. I grant you that. Your purpose was to perform the play, instruct in these other areas beyond the stage——

A. No, we wanted to evaluate the play by seeing it done. Every play we do, we don't necessarily have to advocate its contents. We don't do that. That has nothing to do with the case. We are interested in art form.

Q. One last question—you say you're trying an experiment?

A. Yes.

Q. Would you believe that there were any limitations, any reasonable limitations, that could be applied to experimentation in your classes?

A. Yes, I would not ever allow anyone in my class to do what we call stag shows—I think someone mentioned they'd been to Tijuana—I would not let my class do that. Those are frankly prurient.

Q. These judgments are made by you? In other words, you would decide what would be bad and what would be art?

A. In my class, yes.

By Senator Schmitz: Q. Dr. Duerr, how many of the plays that were presented this semester were followed by a panel discussion?

A. None, not since I've been there—this is the first time we did it. This is the first time we gave permission slips also. I think they go together.

Q. You didn't give out admissions to previous class plays?

A. No.

Q. In other words, *The Beard* had a special significance then, and it was the first one that admissions were given and the first one that was followed by a panel discussion?

A. I had not talked to the community or to the college, and knowing it was a rare and difficult play, I didn't want to embarrass anyone. We're not built to shock people.

Q. But it was something special?

A. But not secret, never secret. If I could have talked to them—anybody could have come and talked to me, anybody. No one was refused admittance.

Q. Since it was simply part of the educational process, no one was refused admittance?

A. I didn't refuse to admit anybody.

Q. I just find it difficult to think that this is part of the educational process, and yet it was singled out as the only play that you allowed admissions and a panel discussion.

A. Well, this is an experiment beyond where we are today. It's a little bit—we're doing an experiment—it was rare.

Q. In other words, you're just helping to make this part of the mainstream in other words?

A. No, we are examining what's in the mainstream, already in the mainstream. We are examining—this is all, and making some judgments.

Q. It seems strange that a play of this nature should be singled out for special treatment as the first one to have admittances and a panel discussion.

It strikes me as more than significant.

A. It's new, a brandnew play. Some plays you can go to you've heard about. You've heard about them in the press and——

Q. That's my point: Are you not contributing to the making this type of play part of the mainstream?

A. If I were making it part of the mainstream, I would offer it to the public.

Q. But it was the first one that you have offered admissions to—not public admissions, but you did state that it is the first play that you brought in admissions.

A. It is the first play that we used admissions for, yes—permission slips, I call them.

Q. But you don't think that this is part of enhancing the mainstream aspect of this type of play?

A. Not at all. I think it's looking at it with your mind and not making judgments—having judgments made for you by other people. If the judgments of what we should do in class with a play, what play we should do, is limited by the state, it seems dangerously near to communism. That's what happened to them. They made the judgments. We don't want that in this country. Do you want us to do that?

Q. I don't want to keep returning to this point, but when you keep talking about state interference, we may end up not interfering at all at budget time.

The Chairman: If there are no further questions, I would thank you for your testimony, Mr. Duerr.

Thank you, Counsel, for appearing with us here.

Mr. Duerr, I'm awfully sorry. I thought the Senator was finished, but Senator Richardson does have a question.

Senator Richardson: Will Mr. Duerr be back tomorrow?

Mr. Duerr: Yes.

Senator Richardson: All right, if you will return tomorrow then.

The Chairman: Fine, if you will come back tomorrow then.

Marion Stanek return to the stand for one moment, please.

MARION STANEK,

having previously been called as a witness, and having been previously duly sworn, testified further as follows:

By The Chairman: Q. Miss Stanek, you were sworn and you're under oath. You have not been released from your subpoena, and therefore, I advise you that you are still under oath.

By Senator Schmitz: Q. I'm sorry, but I came in during your testimony, Miss Stanek, and I didn't know—apparently we don't have your background—you're not a student—what do you do for a living?

A. I work at the William Morris Theatrical Agency in Beverly Hills. I'm a legal supervisor.

Q. Legal supervisor?

A. I handle clients' contracts and court cases and bookings.

Q. Any further questions? Thank you.

Terry Gordon take the stand, please.

TERRY GORDON,

called as a witness, and having been first duly sworn by the chairman, testified as follows:

By the Chairman: Q. I see you're represented by counsel.

A. Yes, Mr. Chairman.

The Chairman: Glad to have you back.

By the Chairman: Q. Mr. Gordon, you were the student director of the play *The Beard*?

A. Yes, sir.

Q. And you were the student director for the play *The Dutchman*?

A. Yes, sir.

Q. These plays both were supervised—both plays were in a class of Mr. Duerr?

A. Yes.

Q. Did you have a statement to make in connection with your involvement in the play?

A. No.

Q. What do you feel was gained in the educational process by the persons who were enrolled in the student body and either observed or had something to do with *The Beard*?

A. Well, I think there's always something gained when one observes a theatrical performance. Just that experience of observing a performance is worthwhile, valuable.

The Chairman: Questions from any of the Senators of Mr. Terry Gordon, the director?

By Senator Schmitz: Q. Terry, how many other plays have you produced or directed besides *The Dutchman* and *The Beard*?

A. Let's see, I've been at Cal State three and a half years—I would say approximately—I'm not sure—approximately six or seven.

Q. You have personally directed?

A. Yes.

Q. How many—you do two of these a semester, that means you've taken several—how many courses are offered in directing in school?

A. When I enrolled, when I was enrolled as a student at the school, there was just one directing course, and I believe at that time it was the policy that two plays were to be performed. Now, there are two classes, beginning and advanced, and I have taken the advanced directing class, I believe, three semesters.

Q. The same class over and over?

A. Yes.

Q. Do you get credit for it each time you take it?

A. Yes.

Q. Isn't this unusual?

A. No, because the amount of classes that we have is very limited. They let you go on, you know, if you want to take the course over again for credit as a graduate student.

Q. How many times will they let you take it?

A. I believe now the policy—and I'm not sure—but I believe the policy is that there is no limit to taking that particular advanced class over again.

Q. All your electives could be in one course over and over again?

A. No, because of the requirements—because of the other requirements that you must fulfill.

Q. I mean, all your electives could be in the one course? Once you have taken your requirements, your electives could be in one course?

A. That may be possible, yes. I'm not quite clear on that.

By Senator Richardson: **Q.** Mr. Gordon, what is your age?

A. Twenty-four.

By Dr. Lowery: **Q.** Mr. Gordon, were there any discussions between you and Mr. Duerr or anyone else about educational implications or advantages of presenting this play, beyond you as a student in directing?

A. I don't quite understand the question.

Q. My question was that was there an intent that you are aware of for educational output from this play beyond that of yourself as a director—obviously the course was required of you?

A. Yes, there was. That's why I instigated the panel discussion.

Q. And who suggested the other values or output?

A. Well, I was the only one—I suggested to Mr. Duerr—

Q. He was there at the panel discussion?

A. Yes.

By Senator Walsh: **Q.** I would like to ask a question. I've heard about this panel discussion that was subsequently held after the performance of the play. Would you care to elaborate on what went on at the panel discussion? I haven't heard any testimony as to what actually happened at the panel discussion.

A. Well, there were many views given from opposite ends, many people were in favor of the play and many people opposed to the—you know, they felt they could not see any merit in the play, and so the objective of the panel discussion was to—myself, along with the panel members—gear along one path and try to focus the audience in on the merits of the play. However, my idea did not quite pan out in that panel discussion—mainly due to the fact that I should have met with the panel members before and made sure we were all going along the right track. I didn't. I gave them a copy of the play several weeks before we performed it and told them to read it and asked them if they would like to participate in a panel discussion on the play, and this particular aspect, as far as I'm concerned, proved to be a mistake. What I should have done was met with them to make sure we were all on the right track, and because I didn't, there were many views—scattered, you know—opposed to the play, for the play—

Q. You feel it wasn't successful—the panel discussion was not a true—

A. I think there were very many interesting comments brought up at the discussion, but I think it could have been a much more sensible discussion if we had followed the procedure that I just mentioned to you.

By Senator Schmitz: **Q.** Mr. Gordon, Mr. Duerr mentioned that this was the first play that people were admitted other than classroom students. Who suggested that this class, that this play have outsiders—let's say, admissions to it? Was it your suggestion or Mr.—

A. Mr. Duerr's suggestion.

Q. But you suggested the panel discussion?

A. Yes.

Q. He suggested the outside admittances?

A. That's correct.

By Senator Richardson: Q. Mr. Gordon, what were the other plays that you directed?

A. *The Dutchman*, *The Madness of Lady Bright*.

Q. What was that play about?

A. Basically the plot is concerned with a homosexual who is a very lonely man in his old age, and towards the end of the play—which is the end—he goes insane because of his problems that he has had in the past with his family, society—acting upon him, problems imposed upon him.

Q. The name of that play was what?

A. *Madness of Lady Bright*.

Q. Now, what were some of the other plays that you directed?

A. *The Worlds of Shakespeare*, Molière's *Two Precious Maidens Ridiculed*.

Q. I'm not too familiar with the last one, but I am with Shakespeare. Would you mind giving me a little bit of background on the last one that you mentioned?

A. *Two Maidens Ridiculed*?

Q. Yes.

A. It's a Molière farce, and it deals with two servants who disguise themselves as masters and go into the mansion of the man who has just moved from the country to the city, and in their disguise as masters, they woo this gentleman's daughters, and eventually they are found out to be just servants and they are chased out of the house.

Q. That's four of them, and what were the other two? I believe there are two?

A. *The Worlds of Shakespeare*.

Q. You mentioned that one before. What were the other ones?

A. I directed a medieval farce, and the author escapes me right at the moment. The name of it is *John, John, Tyb and Sir John*.

Q. What was that about? We might as well give you as much credit as we can for all your directing abilities.

A. As I mentioned before, it's a farce which dealt with a very scolding-type wife, and her husband was just fed up with her and just wanted to get out of the house. He goes and visits the local parson, and the parson comes back and enters the house, eats up all the food and has eyes on the man's wife.

Q. Then we might be able to say that most of the things that you have directed, with the exception of Shakespeare, have rather sexual overtones?

A. I can't think of a play, Senator, that doesn't have sexual undertones or overtones. *The Worlds of Shakespeare*—I directed approximately 16 from that particular show, and they also have sexual undertones.

Q. Did you also direct *Madam Colombe*?

A. No, I did not.

The Chairman: Who did direct that?

The Witness: Dr. Forest.

The Chairman: We have Dr. Forest under subpoena. We will discuss it with him.

By Senator Richardson: Q. By the way, all of these were directed at the school?

A. Yes.

By Senator Walsh: Q. I might ask a question, Mr. Gordon. Was Mr. Duerr the instructor in all the plays that you directed that you just mentioned here?

A. No, he wasn't. I believe *The Madness of Lady Bright* was done under—and also *John, John, Tyb and Sir John* was done under a graduate course that was left open. It's three units of credit as a graduate student and you can do anything you wish within that course, so I decided to direct two plays.

Q. In the cases of the other plays, he was working with you as an instructor in these other plays?

A. Yes, in the other plays, yes.

By Senator Richardson: Q. Were students used usually in performances of these plays that you directed?

A. Yes, they were.

The Chairman: Any other questions? If not, thank you, Mr. Gordon, and thank you, Counsel, again for coming.

We will next call Dr. James Young, head of the drama department.

DR. JAMES YOUNG,

called as a witness, and being first duly sworn by the chairman, testified as follows:

The Chairman: Be seated. Counsel has already been identified. I am sure it's on the record there.

By the Chairman: Q. Just to open the discussion here, is it true, you are the head of the drama department at Fullerton?

A. Yes.

Q. And is it true that you saw one production, the first production, and allowed the remaining two productions to continue?

A. I didn't know about the third production. I did see the first production and knew there would be a second production.

Q. Did you make any effort to stop the second production?

A. No, sir.

Q. That pretty well sets the framework of what we are talking about—were you aware of the fact that *The Dutchman* was presented at Fullerton?

A. I knew it was presented; I didn't see it.

Q. Did you read the script or have any knowledge of it whatsoever?

A. No, sir.

Q. Is it the general rule that you do not know the plays that are being presented in the drama department?

A. I know the plays that are presented for the general public because the entire drama department does meet, and as a department, is the producer of the major plays that are presented. We have 10—actually eight plays plus two dance theaters every year, but we do not know about the individual plays that are handled in individual classrooms.

The Chairman: Sergeant, would you supply Dr. Young with the excerpts from *The Dutchman*, please? Supply a copy to the attorney also.

By the Chairman: Q. Is there something that you want to communicate with us about?

A. Simply that it came out in the testimony, I think, previous to this, that admission was not granted to people at the other one-act plays. I think it should be clarified that this particular play, *The Beard*, was the first one at which permission slips were granted. The other plays are open to the student body.

The Chairman: I think that sets the stage for the frame of reference here.

Would you spend just a moment glancing at the excerpts from *The Dutchman* there since you are unfamiliar with the play and the fact that it was presented at the college.

If the committee would bear with me for about 30 seconds to give Dr. Young a chance to read this. It's already been read into the record. I don't think it's necessary that we have them read into the record again.

By the Chairman: Q. Dr. Young, assuming those excerpts from the play are accurate, would you consider *The Dutchman* to have been a proper presentation in the drama department at the college which you are the drama director?

A. I would probably have to read the entire play, Senator, to be able to give you a good answer on that.

Q. Am I correct in saying that the fact that those particular words were used, that that language was used, that that would not be sufficient reason in your mind for you to feel that it should not be presented?

A. I would say that I personally probably would not present it at the college—speaking for myself.

Q. But in the drama department, of which you are head, this would be a proper presentation if someone else were to present it?

A. This would depend. Now, if this were being done as one of our major productions, which as I said before, our major productions are produced by the entire department, the thing we do is to sit down and go over those plays as a department and decide whether or not they are appropriate for the general public. And I would perhaps even say if I were to read the whole play, I might register a negative vote for this play, but if it is voted democratically by the department, then I'm sure that the department would produce the play.

Q. What about *The Beard*? Do you feel this is a proper play for presentation at a college?

A. I would say that, again, speaking personally, and I've talked to you about this before—I would not have finished reading the play, and therefore, I personally would never have directed it. I couldn't have.

Q. Is it your opinion that perhaps your own personal judgment should not enter into a production at the college?

A. When we're talking about the major productions that are presented for the general public, yes, I feel very strongly that it should, but as far as the individual classroom is concerned, I do leave that to the professional judgement of the professor in charge of the classroom—

Q. Both Dr.—pardon me.

A. I was just going to say that, had it come to me, perhaps I, personally—but then this is a personal reaction to it—and I am on record—you have my statement there—that I didn't care for the play.

Q. Well, both Dr. Dumke and Dr. Langsdorf stated that in their view—I think I am summarizing it fairly well—the judgment for what takes place on a campus should be left to the professors—to the faculty and professors involved. What you are saying here is that as far as you are concerned, the judgment should not be left to someone like yourself, the head of the department, but rather to the actual professors involved; is this correct?

A. Well, it depends—in my own classroom, I believe I would be the authority, the professor or the professional who should make a decision relative to my classroom work. The other things that are produced by the entire department, I feel that the other members of the department should be involved in those decisions.

Q. Just to verify my thinking, the problem of the committee is that when someone says, "You should leave it up to the professors involved or the authorities on the campus involved," I'm afraid it's appearing to us that Dr. Dumke is leaving it up to Dr. Langsdorf and Dr. Langsdorf is leaving it up to you, and you perhaps want to leave it up to Dr. Duerr, and Dr. Duerr leaves it up to Terry Gordon—the committee, I think, from the conversation with them at noon, is a little uncertain to know where the authority is. That is the reason for my line of questioning.

A. Could I respond to that very briefly?

Q. Certainly.

A. In this way—it hasn't actually been brought out that on Thursday morning, following the production on Wednesday night, the production which I saw, I did begin talking with the members of the faculty. We were very busy at that time with all kinds of other activities and so forth, in the department, so there wasn't time—actually, we have regular meetings on Tuesday mornings, and we had agreed, as I would meet various members of the department in the hall, that we would discuss the production of *The Beard*.

Well, of course, individually we discussed it and, as I understand it, the classes and students in the classes discussed it and had pretty well dismissed it. We really hadn't had an opportunity to discuss policy relative to this kind of thing.

By Senator Richardson: **Q.** There's another play that I see you are going to be putting on soon that I am rather curious about—it's called *The Knack*. May I read from the *Titan Times*, which is a publication, I believe. It says,

"Seduction is the knack of 'The Knack,' an eccentric comedy in three acts by Ann Jellicoe, which comes sliding in on a splendid blaze of nonsense Friday, Saturday, and Sunday, January 19, 20, and 21, at 8:30 p.m., in the Arena Theatre. The Drama 470 production is admission free.

"A genuinely comic play of antics and random images, 'The Knack' centers on the gentle art of getting girls."
What do they mean exactly by, "getting girls?"

A. I talked to the student who put this particular article in the paper and asked about even the pictures which was superimposed thereto, and he said, "Oh, come on, Dr. Young, this is the way we advertise. You see it in the paper all the time, don't you?"

And I said, "Well, yes, you do, but don't you think we could have overlooked it at the present time?"

And he said, "No."

The Chairman: I want to commend Dr. Young for his honesty.

By Senator Richardson: Q. May I go on—

"—the gentle art of getting girls. In a London rooming house, three dissimilar young bachelors exercise their charm on a bewildered, apparently innocent girl from the country.

"Tolen is arrogant, hard, a sexual Fascist. Colin is shy, fumbling, and earnest. Tom is witty, cool, tart, and very humane. Into their lives comes seventeen-year-old Nancy Jones, a young fawn of maddening innocence."

The Witness: It's a rather old theme.

Senator Schmitz: May I ask what a sexual Fascist is?

The Chairman: Are you through, Senator Richardson?

Senator Richardson: Yes, I'm afraid I am.

By Senator Schmitz: Q. Dr. Young, have you had any complaints from the students in this directing class about *The Beard* being put on?

A. No, I haven't.

Q. The other question is—Is this correct that students can take this directing course over and over again, or is there any limit on the number of times a person can take the same course?

A. It depends. Again, our curriculum is limited. We are building the department. We have recently been approved to offer a master of arts degree, and the graduate students take a 400-level course. This is one that either the juniors or the seniors or a graduate student can take, and as a graduate student, he can take that course to do special projects.

Q. How many times can he take it?

A. It would depend on him and his adviser and whether or not he fulfilled all of his other requirements for a well-rounded dramatic major.

Q. Is there a lot of educational value in taking this course over and over again?

A. I feel there is because every play has its own peculiar problems. I think any director would tell you this. Every play presents its own special problems.

Q. Is the person who takes it the second time graded on the same scale as the people taking the course for the first time?

A. This, I would have to defer to the instructor. I don't offer that course myself.

Q. I just wondered if it might not be a good way of beefing up your grade point average to take the same course over and over again. You ought to be pretty good after awhile—I mean this in all seriousness.

A. Well, I would certainly hope that it would develop his proficiency as a director, whether he be graded on it or not.

Q. What is the usual grade curve? Do you have a bell-shaped curve in your graduate program?

A. No, we're too new—any graduate program, actually, if you go below a *B* grade—I mean, there are either *A* or *B* grades or you don't get a master's degree, so your degree of efficiency has to be relatively high throughout.

The Chairman: Senator Walsh, do you have a question?

Senator Walsh: No.

The Chairman: Senator Kennick?

Senator Kennick: No, sir.

The Chairman: If there are no further questions, Dr. Young, thank you.

Mr. Paul Omar Stilwell.

PAUL OMAR STILWELL,

called as a witness, and being first duly sworn by the chairman, testified as follows:

By The Chairman: Q. We have your testimony here to the investigator for the district attorney's office. It is substantially the same testimony we've had from other witnesses as to what actually took place.

A. Yes, sir.

Q. In the interest of time, do you have anything to add to the testimony we have already heard?

Would you sit down, please.

A. Not any more than I sure can't see why anybody would put on a play like that, whether it's free or be charged for or anything else. Sex is sex, but I don't think it should be put in those respects. I think it's a disgrace to the school and to the people that had anything to do with it and also to the City of Fullerton. And anything like that, I can't see it.

Q. I appreciate your giving your testimony. May I have your background, sir? Where do you work?

A. I work—I'm maintenance foreman for the City of Fullerton.

Q. Here in this building?

A. Yes, sir.

Q. How long have you been so employed?

A. Going on six years, sir.

Q. You received a ticket from Mr. John Gordon Scott, one of the employees?

A. Yes, sir, I did.

Q. Did you go to Dr. Duerr or anyone else for advice as to the type of production before you went to see it? Were you advised it was a—

A. No, sir, I had no idea. I like plays. I watch a lot of them at the Culture Center here. I thought a state college—of course, not being a college graduate myself, I enjoy these—but I didn't enjoy this one.

By Senator Richardson: Q. Mr. Stilwell, did you see any people there that had quite a few young people there or were most of them elderly? What would you say?

A. Well, I would say I believe they were all 21 or over. There were quite a few my age, some a little younger than my age, but as far as

any real young people, I don't believe there was—of course, 21 is young to me. As far as anyone younger than that, I wouldn't say there was.

By Senator Schmitz: Q. Mr. Stilwell, from whom did you get the ticket?

A. From one of my men that works here in the building.

Q. Do you know where he got the ticket?

A. Yes, he found it out in the parking lot in an envelope.

Q. I was just wondering why he didn't brief you. That explains it.

The Chairman: If there are no further questions—Mr. Stilwell, we do appreciate your coming here.

The Witness: Am I excused?

The Chairman: You may be excused, yes, sir.

At the request of one of the members of the committee, Dr. Stuart Silvers.

DR. STUART SILVERS,

called as a witness, and being first duly sworn by the Chairman, testified as follows:

The Chairman: Are you represented by counsel?

The Witness: Yes, I am.

The Chairman: May I have counsel's name?

Mr. Berman: Howard Berman, American Federation of Teachers.

By The Chairman: Q. Do you have a statement of any kind to present?

A. No, I do not.

Senator Schmitz: I might ask a question about the attorney—you're from the American Federation of Teachers? Have these witnesses furnished their own or has the college furnished them or what is the arrangement?

Mr. Berman: Our firm is retained by the union.

Senator Schmitz: The American Federation of Teachers?

Mr. Berman: Yes.

Senator Schmitz: And they have contracted with you?

Mr. Berman: That's right.

By Senator Richardson: Q. Mr. Silvers, an article you had in the *Times*, I believe you said you speak for a part of the faculty. Would you clarify that, please?

A. Yes. In response to remarks made that were distributed by the president of the college, I was talking with a number of faculty members who objected to the nature of the remarks made by the president. When I presented the proposal to the faculty council, it was in the sense sponsored by a number of faculty members whom I had consulted with earlier.

Q. In your opinion, are the majority of the faculty—in your own opinion, do you think that the faculty or a percentage of the faculty approve of this play as a proper function of a state college to have plays like this?

A. I really couldn't say.

Q. How about yourself?

A. I do not disapprove of it.

By the Chairman: Q. Are you familiar with the play *The Dutchman*?

A. Yes.

Q. Would you say that you did not disapprove of this presentation?

A. I did not disapprove of it.

By Senator Kennick: Q. I merely wanted to ask if you have anything to do with the play other than having witnessed it?

A. I was one of the faculty panelists who discussed the play after its initial performance.

By Senator Schmitz: Q. I was going to pursue that line, but also, was it the faculty senate that passed a resolution regarding this play after the showing of the play, after the controversy erupted?

A. I believe it was the faculty council that you are referring to.

Q. What would be the difference between the senate and the council?

A. There is a statewide Academic Senate to which each college sends two representatives. Then there is, if you like, a local senate. At California State College at Fullerton, it's called the faculty council.

Q. What is the nature of the resolution that was passed by the faculty council?

A. There was a number of resolutions which were discussed. I don't know which one you are specifically referring to.

Q. Well, there was one that was listed in the paper which, in effect, backed up the instructor or his class putting on the play.

A. I am not sure I know of any resolution specifically stating—

Q. I am trying to get what the faculty resolution—

A. I don't know of any resolution which had a positive statement about supporting any faculty member.

Q. What resolutions are you familiar with?

A. There was the resolution which I introduced to the faculty council which was unanimously rejected. I am very familiar with that one.

Q. Now, what was that in regard to?

A. That was in regards to the first memorandum from the office of the president of the college.

Q. I have a copy of one sentence of a resolution I was referring to—"Be it resolved that the Council denies the allegation of improper conduct on the part of the students, faculty and administration of this college in relation to the presentation of 'The Beard.'"

Are you familiar with that resolution?

A. That one statement is somewhat out of context. I recognize it as a statement that was discussed, but I don't recognize the resolution in which it was included.

Dr. Shields: Senator Whetmore, the resolution of the faculty council deliberations on this matter will be presented by Dr. Salz, who is the chairman of the faculty council.

From the Audience: Dr. Silvers is not a member.

By Senator Walsh: Q. I would like to get your interpretation of the response of this panel meeting after the play. What was your observation? According to some other members of the panel—

A. Are you asking for comments on their remarks?

Q. Well, a general feeling. I asked the director and he told me there were some pros and some cons. What is your feeling on it?

A. I agree with Mr. Gordon. There were pros and cons. I do not, however, think there were any pros and cons as to the advisability of putting the play on. I think that was assumed prior to any discussion. It had to do with whatever merit the play had, literarily or dramatically, but never with its status as to whether or not it should have been presented.

Q. What was your personal thinking?

A. At first, I wasn't particularly impressed with the play. I indicated to the audience at that time I was perhaps the last possible member of the philosophy department to be chosen to discuss the play, as my field of philosophy is in science and not anything related to this, and hence, my responses were specifically as a layman. I felt the play at first had little merit, but upon realizing it did cause you to ponder. I have come to the opinion that it is a very, very important play and makes very, very significant comments about the state of the American society.

By Senator Schmitz: Q. Dr. Silver, in your analysis—going back and getting your opinion on Chancellor Dumke's comments that this might have been a study or an analysis of a disease which the play represented, in your analysis, which is the disease; the showing of this type of play or the reaction to the showing of this type of play?

A. The play is no disease. I don't know which kind of reaction you mean. It's your reaction to the play. I'm not in any way qualified to determine whether or not your reaction is a diseased one.

I find that if there is a disease that is at all associated with this play, it is what the play symbolically describes and not the reactions toward the play itself.

Q. Do you think the hangup on sex, as I believe Dr. Duerr described—in other words, the fact that some people are a little—well, shall I put it mildly—squeamish about this type of thing; is that the problem or is the problem the fact that people are getting a little too liberal with sex?

A. I don't know whether squeamishness at all is an issue. I would say there are any number of events that take place on all college campuses which are, in my opinion, as provocative, but since this one is sexually provocative, it has generated this type of response.

Q. Well, you see, I also teach philosophy—or used to—before going into the Legislature. There are two opinions here: One, of course, is that certain things are right and certain things are wrong. The other thing is the relativist's opinion who feels that the absolutist is a disease; the absolutist feels that the relativist is a disease. Which is your point of view?

A. I subscribe to none of those oversimplified remarks, philosophically. I would hate to be in the position of incapsulating a complicated situation with a very fatuous remark.

Q. Were you here when Chancellor Dumke made his remarks?

A. Yes, I was.

Q. What was your interpretation of Chancellor Dumke's remarks with regards to analyzing a disease? Do you think that he felt that the disease was the preoccupation with sex or putting on plays like this or that the disease was what Dr. Duerr called—or Mr. Duerr called a guilt complex with regard to sex?

A. In part, I think the latter, the latter interpretation I think is the one which I derived from the Chancellor's remarks.

Q. Would that be your analysis too, then?

A. In part. I think there is more involved than merely a hangup on sex.

If I can just comment a bit—earlier, it was noted that I think, by Senator Richardson, that he didn't take Billy the Kid—the male lead in the play—to be his hero, and yet we find Billy the Kid being a hero in our television programs, at least, in part, and I think this is partially an indicator of the way, at least, a certain segment of our society reacts to—quote “heroes” unquote. So I think that sexually, part of our problem is a hangup with the various kind of sexual acts. There are a number of others—there is a wide variety of others.

By Senator Richardson: Q. First of all, it was not my comment, and secondly, I might also add that the acting profession, the TV industry, et cetera, have been projecting this image not the public, to my knowledge.

A. No comment.

The Chairman: If there are no further questions—

Senator Richardson: I have one further question.

By Senator Richardson: Q. Would you recommend this play, Doctor, to your students to see as something that they might develop or find some enjoyment or knowledge from?

A. Yes.

By the Chairman: Q. Does that also apply to *The Dutchman*?

A. Yes.

The Chairman: If there are no further questions—Counsel, thank you for joining us.

I think very quickly, we have a couple of witnesses that we can call up in connection with *The Dutchman*. We first have Robert Grant. We're sorry, ladies and gentlemen, but we are going to try to call up as many witnesses in the next few minutes as we can so that those who will have to remain over tomorrow will be as few as possible.

ROBERT GRANT,

called as a witness, and being first duly sworn by the chairman, testified as follows:

By the Chairman: Q. Your name is Robert Grant? Are you enrolled as a student at the college now?

A. Not at Cal State College.

Q. You were enrolled as a student at the time the production of *The Dutchman*?

A. Yes.

Q. And did you play the leading part—I think it was Clay—the part of Clay?

A. Yes, I did.

Q. You've heard it discussed—it's not our intention to take a great deal of time. Did you have anything you would like to convey to us about the production?

A. No.

By Senator Schmitz: Q. In the statement that was read into the record before, did this indicate to the best of your knowledge excerpts from the script as you remember it?

A. Yes, yes, they are accurate.

The Chairman: Any other questions?

Thank you very much. I am sorry you had to wait so long.

May we now have the lady who played the other part in the play, Jane Arthur?

JANE ARTHUR,

called as a witness, and being first duly sworn by the chairman, testified as follows:

By the Chairman: Q. Your name is Jane Arthur?

A. Yes.

Q. Are you presently a student at Cal State College?

A. Yes.

Q. Were you a student at the time of the presentation of the play *The Dutchman*?

A. Yes, I was.

Q. Did you play the female lead—I guess it's the main part, Lula—did you play Lula?

A. Yes, I did.

Q. Do you have anything you wish to convey to the committee in connection with what you learned from having been in—I assume there was some education value?

A. Yes.

Q. Can you convey just what that educational value was?

A. It was done two years ago; however, I do remember the experience that I received from doing that play, as I am sure does most of the audience—my mother included. It was a very moving play. It has a great deal to say about society, about the viciousness of the conflict between the Negroes and the whites, and it was brought out, not with the language intended to titillate, but intended rather to expose the viciousness of this particular person that I play.

I think that the performance was very well done, and I think it was very well received.

By Senator Schmitz: Q. Were you in a play out at the Tustin Playhouse?

A. I was.

Q. Did you play Stella?

A. Yes.

Q. In *Streetcar Named Desire*? I couldn't place you. You did a good job.

A. Thank you.

By Senator Walsh: Q. I'm not too familiar with this other play. Was that also held in class with just students—

A. I'm sorry, *The Dutchman*?

Q. *The Dutchman*.

A. Was it done in class by students?

Q. Was it held with an audience or was it public?

A. Yes, since it was part of the directing program, as Mr. Duerr stated, it was open to the student body and to the public or whoever could come. We called it at that time the Brown Bag Theater, which was at noon.

The Chairman: Any other questions? If there are no further questions, thank you for your appearance. Sorry to keep you waiting all day.

We have several other witnesses now to call at the request of the administration of the college. The chair would like to direct a question to Dr. Langsdorf or Dr. Shields or both. You don't have to come up. We have in mind, on the sequence given to us, Dr. Paulina Salz, president of the faculty council. Is it still your desire that she be called?

From the Audience: Yes.

The Chairman: Paulina June Salz, please.

DR. PAULINA SALZ,

called as a witness, and being first duly sworn by the chairman, testified as follows:

The Chairman: I have been reminded by one of the members of the committee that previously, statements that were to be held to five minutes, ran in excess of this. As the hour is as late as it is, I would ask you to be sure to hold it to that.

The Witness: I can do so if I read fast.

The Chairman: You are welcome to just summarize your statement and leave a copy of it with the committee for the transcript, if you want to do that.

The Witness: I would like to read part of the statement and omit part of it, and you gentlemen have a copy of the statement. However, before I do so, I would like to clear up one particular matter.

You had a witness, Mr. Brock, who stated that he was kept out of the meeting. I would like to state that the meeting from which he was apparently barred was that of the student senate, not the faculty council. We have had no closed meetings on this matter. In fact, we have been hoping that we would have some thorough and unbiased coverage of our discussions by the local press.

Mr. Brock did not attend the Faculty Council meetings as far as I know. [Appendix III Statement of June Salz.]

The Chairman: Thank you very much, Dr. Salz. If there are no further questions—thank you very much for your presentation.

By Senator Schmitz: Q. The purpose of the council is to advise the president in all matters of education and professional policy?

A. That's correct.

Q. To what extent does this advice carry? Can the president veto the advice or—

A. He can and has.

Q. Can and has.

A. Yes.

Q. Is the general procedure that the advice is followed?

A. Generally, yes. He has the power to veto. He has on rare occasions—being one of the finest presidents in the system and one of the finest college presidents in the country—is more likely to ask the

council to reconsider its actions and to meet with the council and discuss the reasons why he feels a certain recommendation is not possible, and there is usually an agreement which is mutually acceptable to all of us.

Q. Does the council, for example, determine who a department head will be or do they recommend to the president?

A. The procedures on recommending a department head comes under the personnel procedures which are a document we have for that—or will have for that from Dean McCarthy, and the procedures are rather extensive.

Senator Schmitz: I'll save the question for Dean McCarthy.

The Chairman: If there are no further questions, I appreciate your coming and I'm sorry to have kept you so long today.

Ladies and gentlemen, the chair had intended to stop at 5. There is one other witness that I believe we can have very quickly and save her having to come back tomorrow. There will be several witnesses that we will require to come back tomorrow and there will be a number of witnesses which will be excused who will not have to come back tomorrow.

I would like to call Mrs. Frances Wood, I believe it is, to the stand.

While Mrs. Wood is on her way up, let me—if I may have your attention, while Mrs. Wood is on her way up, I think it is very important—the Legislative Counsel advises me that subpoenas issued for the 19th are equally as valid for tomorrow. We have subpoenas for tomorrow if we need them, but we are advised that we don't need them. They are equally valid for tomorrow. So when we close off tonight, after Mrs. Wood's testimony, we will recess until 10 o'clock tomorrow morning. So we are still in the middle of the hearing, and those with subpoenas for the 19th, do not feel that you do not need to come in tomorrow simply because tomorrow is the 20th, because the subpoena for the 19th, according to the Legislative Counsel's office, and I urge you to consider this when you come back tomorrow.

Senator Walsh: Unless you have been excused.

The Chairman: Unless you have been excused, yes.

At the end of Mrs. Wood's testimony, we will excuse a number of people and I will name the persons who are under subpoena for tomorrow.

It is our hope at this time that we will be finished by noon tomorrow. That's for the benefit of those who are still interested.

FRANCES WOOD,

called as a witness, and being first duly sworn by the chairman, testified as follows:

By The Chairman: Q. We have frankly, from the investigator from the district attorney's office, not too much information—let me ask you a couple of questions. Did you observe the production of *The Beard* at the California State College at Fullerton?

A. Yes, I did.

Q. Which performance?

A. I don't know how to answer that.

Q. Did you observe the first, second or third performance?

A. I really don't know.

Q. One performance was on Wednesday and two performances were on Thursday.

A. I assume it must have been one of the Thursday's, the one before the last one.

Q. Perhaps then it would be the second one.

You've been here most of the day——

A. I believe you requested my being here.

Q. We did. I'm sorry that you feel hostile, if you do. We mean no hostility. We really don't. We're sorry that you've been kept waiting this long. But I think that those of you who have attended hearings before will agree that we have gotten through a large number of witnesses and we are doing the best we can. I am sorry that you are mad.

At any rate, now, to get back to the question, you did observe the production. You have heard the witnesses and heard the witnesses testify as to what took place?

A. I have been here all day.

Q. Have you or have you not heard the testimony of the witnesses as to what took place?

A. Part of it. Yes, I've heard part of it. I didn't hear it too well because I have a cold and I am not hearing too well.

Q. Do you have anything to add to this testimony from your own eyewitnessing?

A. There's nothing I would care to add or say.

Q. Did you observe at the end of the play what appeared to you to be an act of simulated oral copulation—

A. I observed something, and when I came to a certain point, I ceased observing.

Q. You were in the room but you did not observe what appeared to be an act of oral copulation?

A. I didn't say that.

Q. Did you or did you not observe what appeared to be an act of simulated oral copulation at the end of the play?

A. I observed part of what appeared to be such. I did not observe the whole thing.

Q. Did you hear any language that seemed obscene?

A. I'd have to look up the definition of obscene.

Q. No, no, no, I mean obscene to you. I did not say anything obscene by definition, I said, "Did you or did you not hear any language that was obscene to you?"

A. Undoubtedly.

Q. Does that mean yes or no?

A. I believe it means yes.

Senator Walsh: I think we should have a yes or no so we can have a direct final answer.

By the Chairman: Q. Is it your opinion that the production of *The Beard*, this type of production—*The Beard* especially—is a proper production for a state college campus?

A. I don't feel that I have any opinion on that.

Q. You do not have an opinion?

A. No.

Q. Do you have any other opinions you would care to share with us?

A. No, I don't.

Q. Okay, we'll get a little more specific if we have to.

From the Audience: Sir, could we have a bit of background?

The Chairman: All right, yes.

By the Chairman: **Q.** You live at 713 South Woods Avenue, Fullerton?

A. Yes.

Q. Are you employed?

A. Part time.

Q. For whom?

A. Mrs. Jack Nevious at a dress shop called Look, L-o-o-k apostrophe—I mean exclamation point.

Q. In Fullerton?

A. In Fullerton.

The Chairman: Is there any further information desired?

By the Chairman: **Q.** Just let me briefly ask you a couple of questions. Did the girl in the play apparently have a slit in the right side of her dress?

A. Yes.

Q. When she walked, was one leg completely exposed?

A. Yes.

Q. Did she sit diagonally on a chair?

A. She sat many ways on a chair.

Q. Did she at any time sit diagonally?

A. I'm not too sure what you mean by that.

Q. You don't know what it means to sit diagonally on a chair?

A. No, I don't.

Q. Did she appear to have sexual gratification?

A. I wasn't watching her at that moment.

By Senator Richardson: **Q.** Mrs. Wood, in other words, it was embarrassing? Is that what you mean, it was embarrassing to you at that time?

A. That's a pertinent statement that you just made and I would agree with it.

By the Chairman: **Q.** What I think the Senator is asking is, was the play embarrassing to you.

Senator Richardson: No, I was asking whether she was embarrassed at that point.

The Witness: Twice.

By the Chairman: **Q.** The answer is what?

A. Twice.

By Senator Walsh: **Q.** I would like to ask a question—how is it that you came to buy a ticket or have a special invitation to attend this production of *The Beard*?

A. I don't understand your question.

Q. How were you approached? How did you get a ticket to go to this, or did you find an invitation in the parking lot like the other gentleman? Did someone approach you, hand you a ticket?

A. None of those things are applicable.

Q. Well, would you answer the question: How did you get in?

A. I didn't have a ticket.

Q. Well, maybe I missed something. You say you witnessed the play.

By the Chairman: Q. Let me clarify this. Did you witness the play from inside the room?

A. A room. I don't know what the room is.

Q. Was it a room in which a stage was located?

A. Yes, I believe it was.

By Senator Walsh: Q. You stated you witnessed it from inside the room. How did you enter the room?

A. On my feet, through a doorway, down some steps.

Q. Now, at that time, were you asked for a ticket or a written invitation?

A. No.

Q. Did you have one in your possession?

A. No.

Q. What was your purpose or reason for being there? Were you invited?

A. No.

Q. You were just walking by the place and walked in?

A. Essentially.

Q. Did you previously hear about this play?

A. Previously to what?

Q. Now listen——

A. I'm sorry. If you get angry with me, I'm sorry.

Q. I'm not angry. I'm trying to get to a point here.

A. I am giving you as exact answers as I can. If you don't like them, I'm sorry.

Q. Well, ma'am, you're under oath here.

A. I am telling you exactly the truth.

Q. I'm trying to find out what induced you to go to see this——

A. I go to many things at the state college whenever I can.

Senator Walsh: I'm under the impression here that this was by written invitation only, not tickets, but written invitations only, and according to the witness' testimony, I can't understand how she could just walk through a door in the room where the play was being given without at least some type of invitation.

The Chairman: Dr. Shields?

Dr. Shields: I was just wondering whether it was the third performance, the performance for all the students which was unannounced. This was the performance to which most of the drama students came rather than the other two productions. There weren't passes handed out for that. The doors were open. It was late, so I don't know.

The Chairman: I think we established it was the second performance.

Senator Walsh: Well, that performance was at noon, wasn't it?

The Chairman: No, that was around 10:30 in the evening or 10 o'clock.

Senator Walsh: The third performance?

By Senator Walsh: Q. Well, was it about 10 o'clock in the evening when you witnessed this play?

A. I'm sorry, my watch was broken. I really don't know.

By the Chairman: Q. Well, may I ask you this question: Was it closer to 8 o'clock in the evening when the production started or was it closer to 10 o'clock in the evening?

A. Probably closer to 8 o'clock.

The Chairman: I see no purpose for this testimony at all.

If there is no further questions, Senators——

Senator Kennick: You might admonish the witness that she is under oath to tell the whole truth. There is that to consider—the whole truth.

The Chairman: You may be excused.

The Witness: Permanently?

The Chairman: Yes.

The Witness: Thank you.

The Chairman: Ladies and gentlemen, the hour of 10 after 5 having arrived, I would now like to advise you of those witnesses who we'll expect to be here tomorrow—give me your attention just a minute. The following persons will be expected to be here in response to the subpoenas which have been issued, tomorrow morning at 10 o'clock: Nick Chilton, George Forest, Leland Launer, Dr. Miles D. McCarthy.

The following persons who have been issued subpoenas will be excused by the committee. The following persons who have been subpoenaed may consider themselves excused: Mrs. Barbara Machatto, Mr. George Machatto, Mr. Ray Bass. I believe I will go over the list of the persons again who will be expected to be here tomorrow: Nick Chilton, George Forest, Leland Launer, David Malone, and Dr. Miles McCarthy and Dr. William Langsdorf.

Does the committee have any further questions of any other witnesses now who we have had?

Senator Richardson: Will we have Dr. Duerr?

The Chairman: We will ask Dr. Duerr to return tomorrow.

If you will consider your subpoena, Dr. Duerr, to include tomorrow.

All right, at the request of one of the Senators, Dr. James Dunn will also be here tomorrow. The others will be excused.

The hearing will be in recess now until 10 o'clock tomorrow morning.

SATURDAY, JANUARY 20, 1968

The Chairman: The subcommittee will come to order from our recess last night.

Unfortunately, Senator Kennick had a previous commitment and will be unable to be here. Senator Schmitz has a commitment which is close by which he has had for some months and will be unable to be with us at the start today, but it is hoped that he will be able to return to the committee by 11 o'clock.

Meanwhile, on my left, we have Senator Larry Walsh of Huntington Park, and on my right, Senator H. L. Richardson from Pasadena.

Senator Richardson has some items he wants to read into the record. I hope they will be very brief. He has requested a couple of things to go into the record and I hope they will be brief.

Senator Richardson: The Supreme Court of the United States on a book by John Cleland in the October term, October 1965, and there is a quote in there by Alexander Pope which I think is rather interesting

and I would like to have it entered into the record—it's called "Monster Vice."

"Vice is a monster so frightful mean
As to be hated only to be seen.
Yet seen too oft, familiar with her face,
We first endure, pity and then embrace."

I thought it was a rather interesting quote and I would like to enter it into the record and also I would like to move that the full text of the play *The Beard* and also the full text of the other one we discussed yesterday, *The Dutchman*, be entered into the record and the excerpts from the *Free Press*.

Senator Walsh: Second.

The Chairman: It has been moved and seconded that the full text of *The Dutchman*, the full text of *The Beard* and the excerpts from the *Free Press* which was on the campus a couple of weeks ago be entered into the record without objection it is so ordered.

Any other remarks from any of the Senators? If not, we will call, at the request of the college, Dr. Miles McCarthy.

While Dr. McCarthy is coming up, we'll state that the background is—perhaps since we don't have it before me here, would you give us your background after you are sworn?

DR. MILES McCARTHY,

called as a witness, and being first duly sworn by the chairman, testified as follows:

The Chairman: We have been requested to have the witness sit on the left side of the table and other people with him on the right. Would you identify the gentleman with you, sir?

The Witness: Mr. Tuohey.

The Chairman: Would you spell it for us?

Mr. Tuohey: T-u-o-h-e-y.

The Chairman: Thank you, Counsel. We're glad to have you here this morning.

We have asked each witness to confine their testimony to not in excess of five minutes.

The Witness: May I give you a prepared statement?

The Chairman: You may do that. We would prefer that you give us the statement and then summarize the remarks rather than reading it.

The Witness: Thank you.

The Chairman: If you would do that in the interest of time. We are trying to get the hearing over by 12 o'clock.

The Chairman: Thank you for your testimony, sir. I take it that concludes your presentation?

The Witness: Yes, it does.

By Senator Richardson: Q. First of all, you're making an assumption that we are necessarily going to run back and pass legislation restricting such things—

A. No.

Q. *The Beard* and things like that.

A. No.

Q. And secondly what was the reason for this parallel experience that you have given us relative to yourself? You say it was in the State of Virginia?

A. Yes.

Q. Do you find it rather difficult on our part to be able to refute your statements since we are not in that state?

A. No, my purpose here, sir, is this: In the committee's deliberations, in which we spent a good many hours, we tried to sit down and think of ways we might write, if you will, or propose to the college restricting procedures in which experiences which might incur public disfavor might be handled, and we found it very difficult because each of us had had experiences in our own background which said to us, "Well, now, if such things were done, we feel that we could not in all conscientiousness go before our classes and continue to teach because everything is subject to misinterpretation by someone."

Q. What you are saying in essence is that you believe Fullerton State College and the teachers which supposedly represent it concur in its right for *The Beard* to be put on campus?

A. This is not what I said, no, sir. What I say is: We must, as an educational institution, I feel firstly, be obliged to seek the best professional people that we can, and after having sought them, we then must state to them, "You are the specialists; you know. You are obliged to provide the best education possible and we expect you to do so."

Q. And this group and organization you are talking about of teachers, professors, et cetera, they should have the final word?

A. I believe that in order to maintain the kind of institution that you and I want, they must have.

Q. If my understanding of a dictatorship is correct, those who have the final word on all situations, thus comprise that sort of a group; is that not correct?

A. Say that again?

Q. What I am trying to say is that all the characteristics that I have ever known of a dictatorship is when a few people have the final say so on anything.

A. This is exactly what I hope will not occur. In Russia, as you may remember, they were permitted—or rather prohibited by law from examining genetics in the sense that we do in this country. As a result, they have never made their five-year plan projections for agriculture, vegetable or anything—

Q. But this is the point I am trying to make: People of the United States of America and the State of California decide by representative government what should happen. That's the free system—that's my understanding.

A. Right.

Q. What I gathered from your testimony is that you are saying that a small group of people in the state, numerically, and the educators and the professors have a right and should have a right to have the final decision. Now, that isn't the mass of the people in this state, in my estimation.

A. The mass of people in this state, it seems to me——

Q. Do you see my point?

A. Yes, I see your point, but it seems to me that what I want and what I hope and I am sure you want also is that we, as tax-supported institutions, have a very real challenge and also a very real purpose in examining everything from as an objective point of view as we can to find out whether it is good or bad or likely to persist.

Q. But you said that you thought the professors should have the last decision.

A. The professor—professors, if you will, who are competent to make these decisions, not just one, but the body——

Q. The whole group of these men should have the right to make—in other words, the oligarchies might have the right to make these decisions?

A. The “oli—” who?

Q. All I’m trying to make a point is that I do believe the power of this state still rests within the people and to their elected representatives.

A. That’s correct.

Q. And they have a great deal to say about what happens in the state college system. I do not believe that the sole and final decision rests with the instructors only. This is the only point I am trying to make.

A. Well, that’s probably not a very fair statement to make. I would say that if this be the case, perhaps maybe the people should run the institutions and not seek professional help.

Q. Well, I’ll put it this way: The responsibility of the people of the State of California through their elected officials to choose people to run the state institutions.

A. Yes.

Q. A good example is the Governor of the State of California and the legislative body makes the appointments, if my memory serves me correctly, to the boards—they are given the responsibility, and it’s their responsibility, and then they in turn hire the people within the university to perform the functions delegated to them by the people of the state, and at this point, the people of the state are not happy with how these people are managing it, and I think the people have every right, through their legislative bodies, to make a statement of that disfavor.

A. I wouldn’t disagree. You have every right to make a statement, examining to see what was going on.

By Senator Walsh: Q. In your statement, Dr. McCarthy, you say that the faculty and the AAUP are both well aware that there are no statements or law that can prevent occasional mistakes.

A. That’s right.

Q. Would you call the play *The Beard* and the play *The Dutchman*, and also the amount of times they were produced in your college, and also the initiation of the *Freedom Press* on your campus, would you call these occasional mistakes?

A. Well, sir, let me think about that a minute. I think that, one, I am not in a position to say whether this is a mistake.

Q. You stated in your statement that you cannot prevent occasional mistakes nor incidents which will occur.

A. Yes.

Q. That incur public disfavor.

A. I did not say these particular incidents were mistakes—or we did not.

Q. Would you call them mistakes, occasional mistakes?

A. I would say that there was involved some error in perhaps the way in which this was done. Whether or not—you heard the professional testimony yesterday of people who are qualified to speak in this field. I'm not. I am not a dramatist. I am trained in science and medicine and so forth. I cannot tell you whether it was a good exercise or whether it was not. I am convinced, however, from what I heard that in all good faith, these people thought there was some educational experience to be gained and they gained it, and, therefore, I would go along with them.

The Chairman: If there are no further questions, thank you very much.

Now, at the request of the college, Dr. David H. Malone, please.

I note that Dr. Malone is from Marina Del Rey and we express our regret that it was necessary to call him back the second day. I realize that Marina Del Rey is quite a distance. We are sorry we didn't get to you yesterday.

DR. DAVID MALONE,

called as a witness, and being first duly sworn by the chairman, testified as follows:

The Chairman: If you will be seated there—your background, we have here—perhaps you could tell us.

The Witness: Yes, sir. I am a professor of comparative literature and chairman of the English department at the University of Southern California.

By way of explaining possible relevance, my being here, I regularly teach courses of European drama. I have been asked by the district attorney's office in Los Angeles County and Orange County to testify as an expert witness in pornography trials.

The Chairman: May I, for the record here, state that I was asked a question yesterday by someone as to whether or not we had anyone here who has testified as an expert at obscenity trials. This is the first knowledge that the chairman has had of this experience, and my answer was negative yesterday. This is the first information that I have had that you are an expert in this field.

A. Thursday, I prepared a statement for the committee, but after yesterday's testimony, if I may, I would like to submit the statement for the record and rather address myself to a few of the issues that emerged from yesterday's hearing.

The Chairman: We have asked the witnesses to confine their testimony to about five minutes.

The Witness: Yes. All of the issues in this case are at the very center of my own professional life and professional concern and it seems to me that in yesterday's questions and answers that three essential issues have been a concern of these hearings: First, whether or

not the plays, which predictably would offend many people, such as *The Dutchman* and *The Beard*, should be used in college instruction. Second, whether or not responsibility for academic decisions is properly placed and exercised at California State College at Fullerton. And third, whether or not in public institutions the institutions should not act in accordance with the will of the taxpayers who are paying the bills.

You've all heard a great deal of testimony about *The Beard* and *The Dutchman* and whether or not they should be included in the instructional program. I would argue that their inclusion as performances in classes in play directing was justified. There is no way of knowing whether a play is any good or not unless it's put on. It is possible to depict all kinds of offensive things tastefully on the stage. Sexual intercourse is depicted in the movies constantly, and frequently with considerable taste.

I, myself, don't think *The Beard* is a very good play, but after hearing yesterday's testimony, I am willing to try looking at it sometime on the chance that it may be in the performance it seems better than it does in reading it, so I don't think it was a mistake. I think the mistake was in the security in allowing too many people to see what was actually a classroom exercise.

The Chairman: Let me interrupt you for a question, sir.

The Witness: Yes, sir.

By the Chairman: Q. You mentioned that the mistake was in the security of allowing other people to see what was a classroom exercise.

A. That is people who are not a part of the drama program. I think all of the drama students should have been allowed in. I think professionals in the drama department and so forth should have been allowed in, but the mistake, I would say, was Mr. Duerr's too generous willingness to allow other people who were not immediately concerned with the exercise in the performance——

Q. You feel, in other words, that the events such as this on the campus of a college are proper for certain members of the campus community?

A. Proper as part of the instructional program.

Q. But that it was a mistake to allow the members of the public and members of the press to come in to the performance?

A. Right.

Q. You feel then that the taxpayers should in essence pay their taxes for things to go on on the campus, but should properly and should be properly denied or that it is a mistake not to deny them admittance and knowledge of what they are paying for?

A. I think the taxpayers, if they want to enroll in this course, they have every right to experience everything that goes on there.

Q. You feel only people enrolled in the class should pay the taxes for them?

A. No.

Q. You do feel then that the taxpayers, some taxpayers at least should pay their taxes for these performances and should be denied admittance to them?

A. In this case, yes.

Q. Thank you.

By **Senator Richardson**: Q. Mr. Malone, what do you think would happen on the Southern California campus if you put on the play *The Beard*?

A. There would be great public outcry.

Q. What probably would happen?

A. There—well, there would—

Q. Do you think you would lose your job?

A. No.

Q. You don't think you would?

A. No.

Q. Another thing I would like to ask you: Do you believe that minors should be allowed to see productions such as this?

A. This again depends on whether or not it's part of the instructional program.

Q. If it's part of the instructional program for the university or under the school, you believe that minors should be admitted?

A. College age minors, yes.

Q. Now, you say you have been a witness on many occasions—

A. No, I didn't say I have been a witness on many occasions.

Q. What occasions have you?

A. I was called on a trial in Orange County in which—

Q. When was this, sir?

A. A year ago last month.

Q. Any other time?

A. I was asked by the District Attorney of Los Angeles two months ago to testify, but I didn't have time to prepare the materials, and I referred them to a colleague.

Q. In other words, you've only testified once?

A. That's correct.

Q. In other words, based upon one testimony, you then are an authority?

A. I don't claim to be an authority. The district attorney was the one that claimed I was an authority.

Q. You claim that they claim you were an authority?

A. I said that they called me as an expert witness.

Senator Richardson: I'd like to call Mrs.—

The Chairman: We have a witness on the stand.

Senator Walsh has a picture he wants you to look at.

By **Senator Walsh**: Q. Mr. Malone, I would like to ask you as an expert witness—

Senator Richardson: First of all, I would bring up on voir dire—I don't know if he's really qualified as an expert witness or not.

Senator Walsh: He has entered his testimony and he has been called at this hearing as an expert witness, so I am going to address him as an expert witness from here on out. I don't want to refute the district attorney's authority.

By **Senator Walsh**: Q. As an expert witness, these pictures were introduced into this testimony yesterday, and I'd like your opinion, your qualified opinion, as to whether or not, as a pornographic expert, these pictures would be classified as pornography?

A. In my opinion, no.

Q. Would you say they were more or less art? What is your opinion of a picture like that?

A. They don't make much sense to me because the heads in front constitute observers, and I don't know what the occasion is.

Q. You can't identify that occasion?

A. I can identify it as the ending of *The Beard* on the basis, but *The Beard*—

Q. What act is assumed in that, answer me that?

A. It assumes an act of cunnilingus.

By Senator Richardson: **Q.** Dr. Malone, would you consider that a pornographic act in that picture?

A. If the act were the actual act, it would obviously be a felony.

Q. I'm asking you if you believe that is an act of pornography if called as a witness on it. It's my understanding that experts have opinions—

A. This is a picture, not an act. Now, the act itself, I would have to see staged. I do not believe those pictures are pornographic.

Q. You do not believe those pictures are pornographic?

A. No.

Q. All right, thank you.

The Chairman: If there are no further questions, you may be excused.

The Witness: Mr. Chairman, may I finish my statement?

The Chairman: I'm awfully sorry, I thought you were finished.

The Witness: The other two issues, it seems to me—the one about responsibility has been fully answered by President Langsdorf and Dean McCarthy, Dr. Young and Mr. Duerr. The responsibility was in this case where it belonged, and I think it was properly exercised, with the instructor. He agreed that he allowed the student to pick this play. He wasn't sure he liked the choice, but upon the student's insistence, he let him try it. So it seems to me that the question of academic responsibility is where it belongs, but the final issue, the one that Senator Schmitz emphasized over and over again—I agree with him that it is a crucial issue here—whether or not the taxpayers haven't the right to specify what goes on on state college campuses.

It seems to me that Senator Schmitz used the third person plural, and as an English teacher, I would like to ask that we use the first person—we taxpayers when we pay taxes are buying what? We want a good educational system, and frankly, as a taxpayer, I don't want my taxes spent on an inferior educational system which would result from any legislative attempt to specify, limit and decree what shall be taught in the classrooms.

Senator Walsh: I want to ask one question of Dr. Malone.

By Senator Walsh: **Q.** Using the inserts or the excerpts and fact summaries of both plays. *The Dutchman* and *The Beard*—

A. Yes, sir.

Q. Would you call the terminology used in these plays, in the scripts, would you call this a superior form of education?

A. No, sir, I would not.

I might point out that all of those statements are taken out of context.

By Senator Richardson: Q. To get something right, Dr. Malone, you were called at the request of the state college to appear as a witness on their behalf?

A. I was first approached by the secretary of the AAUP in San Francisco, and I think he suggested to Dr. Shields that I might be called as a witness.

Q. And secondly, what was the exact statement about who called you before on a case—the District Attorney of Orange County's office?

A. His office.

Q. What was the case in question?

A. It was a trial of a news dealer for selling five books. In the course of preparing for the trial, the district attorney asked me to read about ten, some of which had been declared protected by the courts, by way of giving me a notion of what recent court decisions has been, and then in connection with these five, I testified four of them did meet the definition of obscenity in the California state code. The jury convicted on one of the books.

Q. That was the only occasion on which you have done anything in the field?

A. Yes, sir.

By the Chairman: Q. If I understand you correctly, you feel that in this particular case, this particular college, academic responsibility was where it belonged?

A. Yes, sir, I most certainly do.

Q. Do you feel that this academic responsibility, now being established as where it belonged, was properly exercised?

A. I do. If I, as a taxpayer—this experience has made me feel I am very happy that my taxes are supporting the responsible, able people that I have seen here at California State College in Fullerton.

Senator Richardson: Mr. Chairman, at this time, I would like to call Mr. James Clancy to the stand, please.

The Chairman: James Clancy—

JAMES CLANCY,

called as a witness, and being first duly sworn by the chairman, testified as follows:

By Senator Richardson: Q. Mr. Clancy, would you give us your background, please?

A. I am an attorney, licensed to practice in California. I have been interested in the obscenity field for approximately 10 years. I was special prosecutor in charge of a special section looking into the pornographic situation in Los Angeles County during the year 1964. I have been Assistant City Attorney of Burbank for five years. I have participated in approximately 10 amicus briefs in the United States Supreme Court. I have recently prepared or assisted in preparing a documentary filmstrip on the recent decisions in the United States Supreme Court, 26 of them in this last term, and I have written several documentaries or commentaries on laws of obscenity.

Q. You are recognized by William McKesson's office as an authority in the field of pornography because he has employed you in that line of work?

A. Yes, that was—I was a special counsel.

Q. Would you mind giving your statement on what your opinions are relative to *The Beard*? Do you believe that it would be considered as tending towards pornography or a proper subject for a state college to present?

A. Yes, I've read *The Beard* and it is my personal opinion that it is an obscene play, and it's also my personal opinion that it fits within the California definition of obscenity, the present state statutory definition. I base this upon a recent California case, *Landau versus Fording*, involving a similar situation up at California at Berkeley campus. There, Mr. Landau wanted to show a film which was known as *Un Chant D'Amor*. This was a 26-minute, what they call an underground film. He was told that if he did show it, he would be prosecuted. Thereupon, he went into the Superior Court in Alameda County, and after a full trial in which many experts testified, Judge Phillips held the matter to be hardcore pornography and enjoined its showing.

Mr. Landau, in this suit, *Landau versus Fording*—Fording was the chief of police—he appealed it to the district court of appeals, and there, the three judges agreed with the trial court, and in a written opinion filed in the records, reviewed the matter, gave it a brief as to what the film was about and upheld the trial court's decision.

The matter was petitioned to the California Supreme Court, and the petition was denied in a four to three vote with Justices Tobriner, Mock and Peters dissenting.

I might say that Justice Tobriner's philosophical approach was somewhat similar to Mr. Duerr's, but the ruling authority here in California being four to three, Justices Sullivan, Burke, McComb and Traynor denied the petition.

The matter was then appealed—a petition for certiorari was filed in the United States Supreme Court and was one of the 26 cases which was reviewed by the United States Supreme Court this past term. And it is rather strange that in those mass of reversals, it was the only case that was considered by the United States Supreme Court on the merits and upheld as obscene.

A petition for certiorari need not take jurisdiction. They can deny certiorari on the grounds that is discretionary, but instead, they granted certiorari and without argument, they affirmed five to four. The four dissenters were Justices Black, Douglas, Stewart and Fortas.

I, in connection with preparing this documentary filmstrip, took a trip to Washington and the clerk of the court showed me this 26-minute film, and I would strongly recommend that the senators in this investigation take a look at it as it is a matter of record in the superior court in Alameda County. At the present time, it was sent back—it was affirmed. It is nowhere near the offensiveness of *The Beard*.

Now, I can give a reason for my personal opinion as to why it's obscene, but that would be rather lengthy and I don't want to go into that.

By Senator Richardson: Q. The comparison was made, Mr. Clancy, between, I believe, one time to a stag movie—I think a stag movie was brought up during this questioning—what exactly was the way that was presented in relationship to *The Beard*?

A. I would think there was no relationship. I think Mr. Duerr stated that he would not put on a stag movie performance and that this was

not prurient. The great mistake which is made in considering pruriency is that pruriency may either attract or repel. It need not excite a person but it can also repel a person. The use of four-letter words in the wrong area of discussion can be pornographic even though it does not attract one to sexual intercourse; it may repel him. Similarly, they define pruriency as an excessive interest in nudity, sex or excretion, and I don't think that there is anything about excretion which could in the normal sense attract people. It has a repulsion, and I believe that this is basically what *The Beard* is. Up to the very end it has a repulsive quality about it and at the end it may also have an attractive quality because of the connotation of an act of oral intercourse or an act of cunnilingus in public.

Of course, this goes back to the year 1716, 1727, the basis of the obscenity crime and the purpose of it is to exclude from public showings those types of conduct which are regarded as private. This is what our civilization, based on our Judeo-Christian norms, requires—or the majority requires.

Senator Richardson: Do we have those pictures? I would like to show them, if possible, to the witness.

By Senator Richardson: Q. Mr. Clancy, in your expert opinion, would that be considered pornographic?

A. In all three of the photographs it's very clear as to what the act is, and I would say that this portrayal, pictorial portrayal, would be offensive to the vast majority of people, even the vast majority of those people who are considered liberals. That is something which is not acceptable. I would say yes in that regard because it's offensive to the common norms of the community. The community has a right to establish its own sexual norms, and this I think they do through the obscenity crime. In fact, this crime arose in a similar situation—I think it was in 1688. We take our law from the common law of England. With the common law of England, they had no legislature, so the law came into being through the courts which announced what the common conscience of the community was, what was offensive to the community, and the parallel between this age and 1688 is perfect. Sir Charles Studley, who is a playwright, a leading playwright at that time, exposed himself in a tavern, Covent Garden in England, and delivered a blasphemous, an obscene speech, and urinated in the courtyard below. There was no obscenity crime so they brought him into the common law court, and they said that this was offensive to the community because it offended the common conscience of the community, but that was the hedonistic era of Charles II.

Sir Charles Studley was not a leading playwright, but he was a secondary playwright, and he was pushing the norms just as, in my opinion, many of the playwrights of the present time are pushing the sexual norms back.

How does the community react or speak out in the community sense? They do it through obscenity crimes. The judge says, "This is offensive to the common conscience of the community; therefore, it is a crime."

The novel came into being about 40 years later, and immediately printed obscenity became a crime in the year 1727. The common-law

courts took a look at the problem and said, "This is also offensive," and said, "Printed obscenity is a crime."

And then of course, Fanny Hill came through in 1749, but it shows the parallel between the two eras.

People say you can never drive it back to what it was before, but the same situation existed in the 1700's, and, strangely enough, the result of the reaction was to drive society in the other direction towards Puritanism. I suspect that this is going to be the trend because——

By Senator Richardson: Q. In other words reaction to this type of play could set in to where you could actually have whiplash effect that would damage the educational institutions?

A. I certainly do think that. There were two types of testimony—one recognized—the chancellor recognized the problem in pointing to Toynbee's remarks that only two civilizations survived, and he gave an indication that the thought there was moral decay. The other paid no attention to it and said, "We've got to have academic freedom no matter what." If a student wants to put it on, and it spreads through the community, they recognize that they've got the comparison or the comparable situation of a house of prostitution or evil type of instruction—it does affect the community. For example, one professor said, "When I heard that four-letter word the first time, it was offensive, but then after I heard it over and over again, I became used to it." And this was Alexander Pope, writing in 1727, writing in that same era, he was on the other side of the fence from Whiting, Studley and the other leading playwrights of that time. You've got the same situation today, but unfortunately, there are very few Alexander Papes to speak out against playwrights who are pushing the line.

The Chairman: If there are no other questions, the chair will excuse you now and thank you for your presence.

We will call at this time—I think we've called all the witnesses at the request of the college with the exception of Mr. Launer, who will testify shortly. At this time, we will call George Forest. I don't know if it's Dr. Forest—George C. Forest—oh, yes, it is Dr. George Forest, assistant professor of drama, Cal State College at Fullerton.

DR. GEORGE FOREST,

called as a witness, and being first duly sworn by the chairman, testified as follows:

The Chairman: And that gentleman with you has sort of a familiar face—I suspect he's your counsel.

Mr. Berman: Mr. Howard Berman, B-e-r-m-a-n.

The Chairman: Welcome to the council table.

By the Chairman: Q. Mr. Forest, our questioning to you is very brief, based on the article in the *Times* on December 2, 1967, under the heading of "Two Opinions of 'The Beard'"; you have a letter in here allegedly signed by yourself and sent to the *Times* in this connection. Do you recall the article?

A. Yes, I do.

The Chairman: Sergeant, will you give Dr. Forest a copy.

The Witness: I have a copy.

By the Chairman: Q. You do have a copy, fine. I just have a few questions about the article, mainly your opinion, is what I am trying to arrive at here. You say first, "The esthetic quality of *The Beard* is not at all relevant to the issue." And then you say, "Someone has attempted to steer the argument in this direction."

May I ask who you are referring to when you say they are attempting to steer the argument in this direction?

A. I am referring to the editorial by the *Times* which placed in the forefront of the entire controversy the shock value of the play.

Q. You are referring to the *Times*, in other words?

A. That's right.

Q. And the one, two, three, fourth paragraph, you state, "To assume the play's purpose is merely to shock is to assume too much since McClure's purpose happens to be an honorable one as a careful and objective reading of his other works will prove beyond doubt."

Is this your opinion?

A. Yes, it is.

Q. Next paragraph, it says, "There's no mistake, all emotional statements by the college president and the drama chairman to the contrary notwithstanding."

It is your opinion that there was no mistake about putting on *The Beard*?

A. Absolutely correct.

Q. We go now to the top of it over here—the sixth paragraph; you state, "The mention of tax-supported institutions is I fear a mere rhetorical ploy, aside from the fact that education and responsibility—and the latter term is used in an extralegal sense—are radically opposed concepts."

It is your opinion that education and responsibility are opposed concepts?

A. When used in an extralegal sense.

Q. Would you amplify that a little bit? Senator Walsh has suggested that I ask you why you feel or in what way you feel that education and responsibility are radically opposed, and I guess you are going to have to say what you mean when you say the latter terms are used in the extralegal sense. Can you amplify this just a little bit for us?

A. Yes, throughout the testimony, the series of testimony, there has been an assumption that somehow political freedom and the ability of the public to manifest its rights politically has something to do with the educational process in general. I think this is an awfully murky area for many people, but I think we have to face the fact that people are going to be offended no matter what we do in the college system. There are people who last spring came around to me personally, outside the school, who objected to our teaching of the theory of evolution. There are people who I know object to the use of live nude models in the art department. There are people who object to teaching of the anthropological proof or disproof of the existence of God, who object to reading Chaucer.

These are objections which are based on a lack of knowledge, and I would assume that it is your responsibility, as well as ours, in a case like this to inform the public of all the aspects, all of the implications and all of the detriments of the problem.

Q. That brings up an interesting point. Are you aware of the fact that the great majority of the witnesses subpoenaed before this hearing were witnesses requested or subpoenaed by the college?

A. Yes.

Q. Would you say then that by subpoenaing the college's witnesses, taking that time, much more than the time of the committee, that we have been endeavoring to give the community all the facts?

A. Yes, I would.

Q. Going on down, you say, "It is simply unrealistic to think that our mistakes will not happen again." Do you mean it is unrealistic to think that the performances like *The Beard* will not be produced again on the campus at Fullerton State College?

A. Only in part, and in a very small part. There was a section of my letter to the *Times* that was accepted by the *Times*. I have those statements before me.

Q. If they will amplify this question, I would appreciate it.

A. The full quotation runs as follows:

"Sixth and last, it is simply unrealistic to think that our mistakes—in quotes—will not happen again. It will happen again. It is happening daily throughout the state and the country. This is not a challenge. It is a fact. There are no clear lines nor can there ever be between academic freedom and the responsibility—end quote—to which you allude. Obviously, many members of the community and society in the teaching of evolution theory, socialism, art based on live nude models, the function of orgasm, et cetera, is immoral and therefore irresponsible. The free exercise of curiosity naturally leads to the disturbance of deep repressions, yet, these are the hazards of the trade."

That's where the article picks up again.

Q. To paraphrase your last paragraph, you do feel that good taste and responsibility, since they typify what is psychically inert in society, these two things—good taste and responsibility are opposed by education; is that correct?

A. What is inert, psychically inert, is opposed by education.

Q. What, for example, is psychically inert? What are you referring to?

A. I would say that human being, that person most reasonable—and after all, that's what we're in business for, to create an atmosphere to help reason flourish, to help that person most reasonable, who is able to look the hardest at reality and to admit what is there.

Obviously, we're in a case now, in issue now, where certain people are unable to look at an aspect of their reality because certain compulsions, inhibitions that are peculiar to them.

By Senator Walsh: Q. Would you say the majority of the people or a minority of certain groups?

A. I would be unable to say. I would hope that a minority.

By Senator Richardson: Q. You also stated, sir, that this was an esthetically tasteful and entertaining production. It was a humorous and honest work of art. Is that your opinion of the play *The Beard*?

A. Yes, it is.

Q. Would you recommend it to the students that you have?

A. Yes, sir, I would. I would not only recommend it, I would insist.

The Chairman: Thank you, Dr. Forest.

Call Nick Chilton, the president of the associated students.

NICK CHILTON,

called as a witness, and being first duly sworn by the chairman, testified as follows:

By The Chairman: Q. The committee asked you to come up because it's been amazed at some of the items that you have seen fit to present in the *Titan Times* and other places. We noted that you objected strenuously to having this investigation; am I correct in this?

A. Yes, sir.

Q. Your articles at least indicate you are objecting. I will ask you first of all a couple of preliminary questions. Do you recall having discussed this with me on the telephone in Sacramento before the investigation took place?

A. Yes.

Q. Do you recall that I assured you at this time that I would make every effort to make it a fair investigation?

A. Yes, sir.

Q. Have you at any time in any of the articles printed the fact that I gave you my assurance that it would be a fair investigation?

A. No, sir, I haven't printed those articles. I have reported that conversation at some public discussions before the California State College Association.

Q. However, you've never chosen to print any articles stating that you were assured of a fair investigation?

A. I have only written one article, sir. There were other articles written about me, statements that I made, but the only article I wrote were the statements to the associated students.

Q. Have you made any effort to have anyone else write any articles detailing the fact that I had assured you this would be a fair investigation?

A. Well, no, sir, I haven't.

Q. Then my next question, sir, is, since you have objected so strenuously to this investigation, what is the basis of your objection to it—or what has been the basis?

A. I have a statement here that might answer some of your questions if I could—

Q. Well, I'd like to have you answer the question at this time.

A. All right, sir. It is my feeling that the structures that exist in the State of California today for the governors of the college; namely, the chancellor's office and the board of trustees and the laws of California are adequate to control what goes on in the colleges to the satisfaction of all citizens. There are two types or reputations that an institution of higher learning has. One is the reputation of the community, or the community at large. The other is a reputation in the academic community. It is my belief that since the structures did exist that all the information about the plays could have been obtained in another way that would have protected both these reputations.

Q. What way would this have been?

A. An investigation by the chancellor's office, by educators, I think could have collected the same information.

I believe that a report was requested by the chancellor's office and President Langsdorf. I believe this could have collected the same information.

By Senator Richardson: Q. Then you believe that educators should investigate educators?

A. No, I said the board of trustees, which is not made up of all educators.

Q. But normally their way of doing it is to delegate the responsibility to people of the education community because the witnesses before stated that this should basically be an inside cleanup job—it's your responsibility entirely—or the educators' responsibility entirely, so how can it be assumed that they would not pick educators?

A. May I refer to the incident that happened at San Francisco State? Immediately after that very unfortunate incident, violence, the board of trustees met in whole and investigated that incident very thoroughly and then assigned another investigating team. These were able investigators. As I said before, on the board of trustees, I attended there the other day, and the Governor of the State of California was present, the Speaker of the Assembly was present, Dr. Max Rafferty, State Superintendent of Instruction, was present—all types of public officials and members are represented on the board of trustees.

Q. Then you do believe it's all right for public officials to have meetings and look into these things?

A. Oh, yes.

By the Chairman: Q. If you do believe it is all right for public officials to have meetings to look into these things, why do you believe it's improper for the Senate of this state, as public officials, to do the same thing?

A. I think that the Senate and the Legislature of this state has already instituted structures to do this type of thing.

Q. That's right, it instituted this committee.

A. I think before that, they instituted the board of trustees and the office of the chancellor.

By Senator Walsh: Q. Pursuing this a little further, if you think that an incident could occur on a college campus that was questionable, how many times do you think it should occur before somebody finally gets off the dime and looks into it, as far as the board of trustees or somebody in a higher position that is qualified?

A. Well, I think that the laws of our state, as a citizen myself, I feel that the laws of the state are adequate. If anything illegal occurs on our campus or any other campus, I would hope that due process would ensue and that the people responsible for the illegal acts would be prosecuted for it.

Q. In other words, the complaints of the majority of the people of the State of California who support these institutions are not satisfactorily acceptable to you, in your opinion, to create any type of investigation? It's probably your line of thinking that this was not against the common law and public opinion of this state, and I can

see no other reason for us being here unless there was a majority of the people of the State of California complaining to our body because no action was taken on the first particular time at another college, and finally after three performances here at this college, and also another performance of *The Dutchman*, no one's done anything, so what would you do in that case if there was no action; let it go and ride?

A. No, sir, I don't think it would go and ride if it isn't legal. And if the majority of the people of California feel that this type of thing is so objectionable, I would assume that the courts and the Senate would therefore make it illegal and it would be possible to prosecute.

Q. That's the purpose of our being here, to report back to the Senate in Sacramento, after these hearings, and make a recommendation as to whether such laws should be enacted into the code of the State of California.

A. Well, as I said before, I think that the gathering of this type of information properly, in my opinion, could have been gathered in another way that would have been less harmful to the reputation of the college.

By Senator Richardson: **Q.** Mr. Chilton, do you believe the hearings have been fair?

A. Yes, sir.

Q. Secondly, did you see the production?

A. No, sir, I'm not a drama student. I doubt if I would be allowed to see it.

Mr. Chairman, may I speak to one point that was raised in the testimony yesterday that I think needs clarification? Mr. Jim Brock, who is a reporter for the Santa Ana *Register*, reported that he had been barred from a meeting. I would like to explain exactly what happened.

The Chairman: As a matter of fact, your name was mentioned. He stated that you had barred him from the meeting. I think that gives you definitely a right to explain.

A. That particular meeting was a regular meeting of the Associated Student Senate. Prior to the meeting, that senate had passed a resolution which had directed me as president of the Associated Students to invite the president of the college, Dr. William Langsdorf, down to the senate chambers to have a meeting with the student senators so they could talk about the situation. It has been my experience in working with student groups, as I have for four years, that outside reporters sometimes make them hesitant to ask questions and to be frank.

I believe that in this instance, it was important to insure an air of informality, and I therefore made the decision not to let the outside press in.

I spoke to Mr. Brock about this on the phone—I believe it was the day before the meeting occurred. He asked me the reason and I told him, as I told you, my reason for not inviting the outside press. He said, "Thank you."

It has also been said that I talked to counsel about this before I did it. That isn't true. I have long been aware of our right to exclude the press or to invite the press to our meetings. I knew this as a result of

my work with the student government for three years before that and also as a student of communications, I am aware of some aspect of accessibility. It is my opinion that my objective was fulfilled, the air of informality did arise which would not have arisen with the presence of a reporter.

Mr. Brock also asked me the day before if he waited around perhaps I would have a statement about what happened at the senate meeting as soon as the meeting was out, and I said this would be proper. I would certainly do everything I could to see that that happened, and Mr. Brock was not present after the meeting.

It was reported in our student press, as Mr. Brock told you. Again, it's been my experience that the presence of student reporters doesn't have the effect on the students that an outside reporter does.

Also, at that meeting, Dr. Langsdorf's comments as it turned out, even though there was a strong air of informality, nothing was said that hadn't been said by Dr. Langsdorf before.

Senator Walsh: There is a gentleman out in the audience that looks like he needs a cigarette, Mr. Chairman, why don't we recess?

The Chairman: Are you finished with Mr. Chilton?

Thank you for coming.

(Recess.)

The Chairman: The committee will come to order. Forgive us if we rush along, but in the interest of time—the last witness to be called at the request of the college is Mr. Leland C. Launer, chairman of the California State College Advisory Board at Fullerton. Mr. Launer is an attorney of considerable note in Fullerton for many years—Mr. Leland Launer.

LELAND C. LAUNER,

called as a witness, and being first duly sworn by the chairman, testified as follows:

The Chairman: Again, let me impress as I have on the other witnesses, hopefully, if you can confine your statement to about five minutes, Mr. Launer, the committee would greatly appreciate it. We have two or three other people who have requested to testify voluntarily. We do have questions of, I believe, Dr. Langsdorf, Dr. Young and possibly Dr. Duerr, and we are going to try to get out as close to 12 as we can. So if you will make it as brief as possible.

The Witness: Thank you, Mr. Chairman. I am sure I can condense it to the time allotted. I will read a statement which I believe would follow within the allotted time.

The Chairman: Will we have copies of that statement?

The Witness: You will, sir.

The Chairman: Is it permissible with the committee that this be entered into the record?

The Witness: I desire that it be entered into the record and copies will be delivered to you.

The Chairman: Before you start, one other statement by Mr. Sam Campbell requested to be entered into the record.

(Whereupon it was duly moved and seconded that the statement be entered.)

The Chairman: The statement by Sam Campbell has been entered into the record and is available for anyone who would like to read it.

Mr. Launer?

The Chairman: If there are no further questions—Mr. Launer's testimony has been entered into the record and the attachments thereto, if you please.

Any objections? So ordered.

We have testimony here from a Mr. George St. Johns, president of the California State College Student Presidents Association. He has a statement that he wants entered into the record, and in the interest of time, may I have a motion—

Senator Walsh: So move.

Senator Richardson: Second.

The Chairman: It may be entered into the record.

We have now several people who have asked to testify voluntarily. We will ask several of them to come up together. Do we have a Dr. Marshal Bialowsky? I believe it's B-i-a-l-o-w-s-k-y, if I'm pronouncing it correctly. He's not here? These people are not under subpoena. G. Dean Riman. Is there a G. Dean Riman in the audience? Is there a Henry S. Samuels, president of the Greater Fullerton Improvement Association? Mr. Samuels, would you come forward?

Do we have an Olie K. Nash? Do we have a representative from the California State College Association of Professors?

A Gentleman: Mr. Chairman, I am the president, but I am not prepared to give any statement this morning. I would like permission, if I might, to submit a statement to the committee in connection—not necessarily for the official records, but—

The Chairman: We would be very happy to have your statement. I can't put it in the official record unless it's submitted today, but we will be glad to have it, and if you will give us at least six copies, we'll see that each member of the committee gets it.

Mr. Henry Samuels and Mr. Olie Nash, raise your right hands.

OLIE K. NASH,

called as a witness, and being first duly sworn by the chairman, testified as follows:

The Chairman: May I ask you just briefly, you are a student at the college?

A. Yes, sir.

Q. And what does your testimony consist of generally?

A. Well, during this entire hearing I don't think we've really had anybody that has spoken for the students themselves.

Q. We had Mr. Chilton as their representative, sir, and he's president of the Associated Students.

A. I would like to make a couple of comments on what I feel has been the effect on the students. There has been a lot of talk about what has been learned from the presentation of *The Beard*. This is my interest. I'm in, perhaps, an unusual position in that I am a 31-year-old veteran, and I'm also a freshman in this school, and this puts me in direct contact with a lot of people younger than I am, people I have

been concerned with for some time. And dealing with young men in the last three years in the Army and seeing their problems, problems of frustration, disbelief, alienation, distrust of their schools, their parents, their religions and their country.

I really was in a position of our generation of not understanding why this feeling exists, and I believe sincerely that the production of *The Beard* and the ensuing events have answered this question to some degree to me, and this is what I want to speak on.

The Chairman: I will have to ask you to be brief, sir.

The Witness: Yes, sir.

To begin with, I think everyone here, this committee and the parents in the community should be very proud of the reaction of the students toward this whole incident. Here you saw a group of students watch a very mediocre play, skillfully presented, and then reacting in a very dignified and mature manner—applaud the actors, the director, and dismiss the play for what it was.

Also here, though we saw the spite of a former teacher at work, we saw the guardians of our democracy, the press, disregard the truth and print information that was not fact. We saw a member of our state government come to the campus and insult the students from the speaking rostrum with thinly veiled obscenities, may I say.

We also heard from another state representative that truth and academic freedom have no place in politics. Now, to me, this is the real learning situation that has occurred here, unfortunately. I believe that if we are finding fault with our young people, if we are not able to communicate with them, then I think we should examine our own means of communication, our own methods of communication.

If we feel that they are, in fact, incapable of judging right from wrong, if they are unable to assimilate [sic] the trash from what is worthy, then I think we had better look back to ourselves again for this.

If, in fact, our younger generation is in trouble, if they are lost—which I doubt—but if they are, then I submit, gentlemen, that you and I, the older generation, we have put them there and this should be a major concern of this committee.

By Senator Richardson: Q. Since when have we implied any place that the younger generation is lost? They seem to be rather outspoken and well able to state their position.

A. Well, sir, I have been of the opinion until recently, myself, in dealing with young men coming into the armed forces and seeing the fact that they appear to be lost, that they have no belief in their government; they have no belief in their country. It's very difficult to teach the men——

Q. In other words, this is your opinion?

A. This is my opinion, sir.

Q. Your opinion only.

A. It's an opinion which is shared, I must say.

The Chairman: The chair is going to have to rule that this will have to be confined to the purpose of the resolution. Do you have any further evidence to offer with reference to the production of *The Beard* or the other two instances we have in there?

The Witness: I can only give you my opinion as to *The Beard*, and I didn't see *The Dutchman*, but the production of *The Beard* that I did see——

By the Chairman: Q. You saw *The Beard*?

A. I saw *The Beard*.

Q. What was your opinion of it?

A. My opinion of *The Beard*, as I have already said, it was a mediocre play, but presented very skillfully. It was a good learning situation, I think, for anybody that viewed it with the right attitude.

The Chairman: Thank you very much. You are excused, Mr. Nash.

We will now hear from Mr. Samuels, president of the Greater Fullerton Improvement Association.

HENRY S. SAMUELS,

called as a witness, and being first duly sworn by the chairman, testified as follows:

The Chairman: We have a statement here from you, Mr. Samuels, and we would ask you to summarize it for us.

The Witness: Mr. Chairman, I feel that the community as a whole has not had too much to say on this situation.

An ad hoc faculty committee was established at Cal State Fullerton to review academic freedom and professional responsibility of on-campus events and made the statement that they did express regret that some individuals were distressed by the presentation and denied that there was any improper conduct on the part of the students, faculty or college administration.

I say this with all sincerity: If this committee really believes this, I say they do not belong in our community.

I feel like many others that I have contacted in our community—dozens since this play was presented, and they feel that the play was obscene and that the play is not and should not be associated with our community.

Another area in relation to the performance of this play, there seems to be an immunity from the police. There seems to be an agreement that the police do not become involved with the campus. Do we want in our community a local area that is remote from the local police? I say that the community cannot afford to have an area within its boundaries that is not controlled by the local police.

One member of our community called our local police and asked—"If I put this play on in my home, what would happen?" That person was told in no uncertain terms that if he did he would be arrested.

I talked with several reporters that actually saw the play right after it was presented. I talked to the local police, and the whole situation becomes kind of one sided. The community, in one respect, under one set of rules and regulations, and the college, under another. This, I say, we should not have in our community.

I have children, one which is graduating from high school this June, that I expect to go to this college. I have two more within the next three years, and I must state that under terms of types of programs of *The Beard* and *The Dutchman*, I would not want any of my children associated with this college.

Another great area of concern is the tenure of a professor given his tenure after this community, state or what have you—the presentation of *The Beard* associated with the college.

I am not a faculty, student or anything of the college; however, I feel, myself, that this tenure was given to basically get the president of the local college off the hook so he could not have any direct connection with the man.

By Senator Richardson: Q. Mr. Samuels, this is an opinion on your part?

A. This is my opinion.

Q. I want it shown in the record as just your opinion because there is conjecture here that I see nothing to support it by the facts. We got a lot of that during the hearing, and I do get a little nervous hearing your relationship with the police department intimating that they have something going with the college—or we have other comments relating to what you want to believe the tenure situation might be.

A. This is my personal opinion.

Q. These are personal opinions?

A. My personal opinion only.

The Chairman: All right, continue, sir.

The Witness: In concluding, there must be some way for those who pay the bills to be heard. There must be some way for the taxpayer to show his displeasure of activities on our college campuses.

I talked, as I stated before, within two to three days, to two reporters that actually saw the play. One of those reporters, Ray Mass in particular, stated to me definitely that what he saw from his advantage [sic] point, seeing *The Beard*, that it was not simulated. That's all.

The Chairman: If there are no questions, thank you very much for your testimony, Mr. Samuels.

We have three remaining witnesses under subpoena: Dr. Langsdorf, Mr. Duerr and Dr. Young.

Senator Richardson: If I am right, that material that was sent to us by the last witness, Mr. Samuels, that was hearsay evidence. Is that admissible?

The Chairman: It is admissible in this type of hearing. He has a right as did many other people from the college, I might say.

Dr. Langsdorf, you are still under oath from yesterday.

Dr. Langsdorf: I understand that.

DR. WILLIAM B. LANGSDORF,

having been previously called as a witness, and having been previously duly sworn by the chairman, testified further as follows:

The Witness: May I make one statement for the record. I have been a member of the board of the Chamber of Commerce of Fullerton for some several years, and I have never heard of Mr. Samuels or the greater Fullerton Improvement Association.

The Chairman: First of all, the audience will confine their applause to something reasonable. Would you rather be excluded, ladies and gentlemen? I have the sergeant and staff here ready to do it. Take your choice.

I appreciate your remarks, Dr. Langsdorf; however, I do not feel that this status of the gentleman is pertinent to our hearing——

The Witness: I did not mean to create——

The Chairman: We have not questioned the authenticity of other people who have come up and I don't feel it's proper to question this gentleman's authenticity. If he says he's president of this association, it seems to me we will accept it on that basis.

By Senator Richardson: Q. First of all, Dr. Langsdorf, some of the most vocal members here, are they members of your student body?

A. I have not seen nor recognized many members of the student body. I do recognize some faculty and some members of the community here, but most of the people I think I do not know.

Q. I have a series of questions I'd like to ask you, if I might. First of all, do you believe that a professor is responsible for the protection of the moral fiber of the students?

A. I believe that part of the educational program is moral, yes.

The Chairman: Would you answer the question, please, Dr. Langsdorf.

The Witness: I thought I did.

The Chairman: Did he answer your question?

Senator Richardson: Yes, he did.

By Senator Richardson: Q. Do you believe that plays like *The Beard* them have a corruptive impact upon young people?

A. I would wish to leave this to the judgment of the professionals.

Q. I'm asking you because you're head of the school.

The Chairman: He's asking for your opinion.

The Witness: I have no opinion on this.

By Senator Richardson: Q. You have no opinion on this?

A. No. It personally offends me—I would agree to that. My own background is in the puritan tradition, both ancestry and education and ministry.

Q. Do you think your selection as the president of the university might have something to do because of your background? Obviously it must. You think that would be a fair statement?

A. I don't think that particular background had anything in particular to do with my selection. I think my education and experience——

Q. In other words, your moral fiber, you believe, was not taken into consideration as far as the judgment of why you should be the president of this school?

A. I have no way of deciding what determined my selection by the superintendent and the board of education.

Q. What I am trying to get before the board, if I might, is that you have a value judgment you can make as to the moral level of the teachers you have on your campus. Do you make this type of a value judgment relative to instructors who serve underneath you?

A. Each of the proposed instructors and each of the valuations every year is carried on by the professional people at the department level, at the division or school level and the collegewide level, and I accept their recommendations.

Q. In other words, you accept the recommendations of others on who should teach?

A. Yes.

Q. Am I correct in that assumption?

A. That's correct.

Q. Then what do you do, sir, at this school besides the overall administration? Do you have any say-so in the selection of these teachers?

A. My responsibility is to help in the selection of these people and to provide leadership and guidance insofar as I can.

Q. Well, going back to your personal opinion, then, do you believe that a play like this, *The Beard*, is corrupting to the youth?

A. I'm not prepared to answer that. I say I believe it is offensive to me. On the other hand, I recognize the position that some people have taken that simulated sex logically—if I look at that logically—is simulated sex any worse than simulated murder? We see that portrayed before young people, before children on television every night, and I assume that this is part of the background and culture of our society that regards sex as somehow evil, whether it's normal or abnormal. So, philosophically and logically, it's hard to understand this, even though my own background revolts at something of this sort.

Q. In other words, you have a hard time coming to an opinion on it then?

A. Yes.

Q. I have a serious question I would like to ask you. How many times can a student take a class? From what I gather, Mr. Gordon took that class quite a number of times. Is it advancement or is it the same class that he takes over and over again?

A. I would have to have Dr. Young here to give you the details, but it is the practice in production courses, in music, in chorus, in drama, in the few areas of that sort, where a person can continue to learn more, to allow the person to repeat that course for additional credit.

This is not customary in the traditional courses but in the production-type course, creative-type course such as music and drama, this is possible.

Q. In other words, they can take it approximately on and off for three and a half to four years—

A. I doubt if it would be that long, but I would have to refer that to the music department and the drama department to tell you these specifics.

Q. There's been a great deal of discussion on the tenure. This was brought up a little earlier—relative to Mr. Duerr. This was given to him during the period when the controversy was going on. My understanding of tenure is acceptance of a person's teaching standards, et cetera, and everybody is happy with his performance at the school; a man gets his tenure, and it means he's doing a good job, right?

A. This is correct—the valuation of Mr. Duerr for this year began last October, or perhaps late September. We have a very, very thorough and careful evaluation at the department level, the department committee, the department chairman, division or school level and at the all-college level. There is an all-college review. All of this

had taken place before the incident—or all except the final college review had taken place before the incident arose. I looked at the evaluations and studied them carefully. He was very, very highly regarded. He is a tremendously respected man in his field. While I disagreed, as I indicated publicly, with his judgment in this matter, I feel that any professional can make an error. If he is to be disciplined, may I say, if a faculty member is to be disciplined, it makes no difference whether he has tenure or not.

I felt on the basis of the recommendations that I had no valid reason for not letting him have tenure, and he gets it automatically unless I write a letter of nonreappointment before December 1st.

Q. In other words, it's a fair statement to say that *The Beard*, *The Dutchman* and these other productions which Dr. Duerr talked about were a part of the record—this is all part of his overall performance that was taken into consideration, and then he was given tenure?

A. Yes. I would say his entire record.

Q. Which this definitely played a part and the school had full knowledge of?

A. Well, I believe *The Beard* was probably done after the original evaluation by the department.

Q. But *The Dutchman* was not?

A. *The Dutchman* was not; that's correct.

Q. Do you quite agree with Professor Dittman when he said that the final act of this thing, the oral copulation, was done like a ballet? I was very interested in this—well, I don't know if that is quite within the realm of what I should be asking you—does it bother you when a professor makes that kind of a statement or do you think it is well within his framework to make that kind of a statement?

A. I don't really know what Professor Dittman said—or I mean meant by his statement. I was not there at the performance. I'm not sure what Professor Dittman means by a ballet.

We have in our faculty almost 400 persons, and I'm sure in any faculty, you will find almost 400 different opinions. There's no monolithic agreement among faculty as to what something is or should be.

Q. What is the number of students you have on campus right now, Doctor?

A. We have 9,000.

Q. 9,000?

A. This makes us larger than 90 percent of the colleges and universities in the country. We have achieved that in less than nine years.

Q. Is that 9,000 full time?

A. No, 9,000 students all told. I think it's around 6,500 full-time equivalent.

Q. What specific conduct do you believe is unworthy of a teacher that would instigate you to demand his dismissal from the school? Is there anything specific, any criteria that you would set?

A. Yes, there is a list in the Education Code. I can get that for you. There are things that are regarded as the basis for dismissal—one of those being unprofessional conduct. Unprofessional conduct must be evaluated by his peers in accordance with due process. Let's see if I can find the Education Code provisions here—

Yes, the basis on which a person may be dismissed, demoted or suspended—Section 24306 of the Education Code—a permanent—that's one with tenure—or probationary or academic employ may be dismissed, demoted or suspended for the following causes: Immoral conduct, unprofessional conduct, dishonesty, incompetency, physical or mental unfitness for the position occupied, failure or refusal to perform the normal and reasonable duties of his position, conviction of a felony or conviction of any misdemeanor involving moral turpitude, fraud in securing appointments, drunkenness on duty, addiction to the use of narcotics or habit-forming drugs.

By the Chairman: Q. To follow through on that, you don't feel that the presentation of *The Beard* or *The Dutchman* constituted immoral conduct?

A. No. If there had been an illegal act, I believe this would have been an immoral act and therefore subject to dismissal.

By Senator Richardson: Q. Does an immoral act necessarily have to constitute one that is written in the law?

A. The other basis on which this determination would be made would be unprofessional conduct, and if a person acts unprofessionally, I would assume immorality might carry over into that also, then that would be a basis, but that unprofessional conduct—I could bring charges which would have to be evaluated through a complex procedure which we have established. Due process is required. Then I could make a recommendation to the chancellor.

Q. How long have you been president of Fullerton?

A. I was the founding president in 1959.

Q. In that time, have you dismissed any people from service?

A. Yes—not dismissed, I have failed to reappoint a number of people. Let me think, though—yes, I have dismissed, yes.

Q. People from office?

A. People from office, but I forget the specifics at the moment, but I have dismissed people from office.

By Senator Walsh: Q. I have one question. According to the testimony, according to the Education Code Section 23657 that requires the executive secretary to meet and report all activities of the board and the recommendations of the board to the board of trustees, and the duties of the state college advisory boards are as follows—or should be briefly stated that the Education Code Section 23655, that the board is to consult with and advise the president of the college with respect to improvement and development of the college.

A. That's correct.

Q. Now, what I want to know, do you feel that this performance was put on in this tax-supported institution, do you feel that the instructor made an error? Do you feel that this entire situation was a poor judgment or an error—regardless of his testimony, how he feels—do you feel within yourself that an error has been made here?

A. Yes. I so publicly stated. In the first place, I felt when he told me that his justification for giving the play that even though he felt it was a dull and repetitive play and that he himself did not feel it was good—he would not himself select it, that he nevertheless permitted the student to make the decision, and I felt that if this was the only

reason that this was an error in view of the possible affront—now, there have been many other reasons given subsequently as to the educational value.

The second error I felt was in not maintaining adequate control because it's very obvious that persons who were not interviewed by the professor and who were not prepared for this sort of shock were there. I felt that was an error, and I criticized Mr. Duerr.

I told our advisory board that when we met on December 4th. They supported me unanimously in a resolution, supporting my disapproval, my expression of disapproval, and that there be no further steps taken with regard to Mr. Duerr.

Q. All right, we have established the fact that you firmly believe there was an error committed here.

A. Yes.

Q. Do you believe that this, as acting president of this college, has been performed for the improvement and development of this college?

A. I believe it's up to the professional judgment of the people concerned to decide what is appropriate in the classroom. I think what one of the major errors here was the fact that this was no longer—did not become a classroom situation.

Senator Walsh: Well, I can't understand it. I have no further questions.

As far as I'm concerned, the fish smells from the head and I can't seem to find the head around here. No one in this room has yet told me who has responsibility around here. It bounces back and forth between all of you, and I can't see who we are going to look to to find out who was responsible in this college, because we have no one to look to as the leader of this. You state that you are here for the purpose of leadership and guidance, and yet, you fail to act or you go ahead and recommend that this man be given tenure when you, yourself, admit there has been an error committed here.

The Witness: Yes, I think—

By Senator Walsh: **Q.** Who is the leader here?

A. I think anyone can make a mistake. The medical association, the bar association, all professions recognize this.

Q. But do you compound that mistake with further errors?

A. If there are repeated mistakes, I think then I would present this through our procedures for examination by his peers to see whether this is continued unprofessional conduct.

Q. But after this error was committed, and prior to this investigation, you at that time went ahead and had no objection to this man being given tenure.

A. No, I felt that on the basis of his outstanding record of accomplishment, his ability, the recommendations, that he deserves tenure.

Senator Walsh: Okay, that's all I wanted to know.

By Senator Richardson: **Q.** You said, "of his peers." What if a teacher did something that you, yourself, felt necessitated his dismissal from the school. Could you by yourself make that decision?

A. I could not immediately. I would have to—well, first, if there is something so grave that it immediately endangered the life or welfare

of the students—for instance, a faculty member coming on the campus with a gun or something of this sort. I can immediately suspend him. However, under ordinary situations, unless there is that situation, I must bring charges with due process, otherwise, it will be overthrown by the State Personnel Board. He can appeal to the State Personnel Board eventually, and probably to the courts. So I must go through due process. Now, due process means evaluation by his peers, and I can present to you—I don't have enough copies——

Q. You mean by all the teachers then; is that correct?

A. I can——

Q. You can institute that?

A. I can institute that. I don't have to agree with that. If their recommendation is still that he should not be disciplined and I feel that he should be, I may still recommend to the chancellor that he be dismissed. I do not invoke the discipline myself.

Q. Then they can take you to court on that?

A. Yes.

Q. And that is usually inevitably what happens, isn't it?

A. Normally, yes.

Q. In other words, you just can't come up and fire some guy?

A. No, I think the faculty deserves every break that the citizen has to protection——

Q. Department heads can't either, can they?

A. No.

Q. Okay. So then would you say very honestly then that the teachers have an awful lot to say about what goes on in the university?

A. This is part of the nature of higher education.

Q. As far as disciplinary practices are concerned, I can understand that, but you really cannot—from the chancellor all the way down, you have a very difficult time to get rid of an employee?

Q. Just summary dismissal; however, if a person is not tenured, I do not need to reappoint that person, and unless he is coming up for tenure, the final year, he is not subject to review.

Q. But if he has tenure?

A. If he has tenure or is immediately approaching it, then he has every right of appeal.

The Chairman: Dr. Langsdorf is turning towards counsel. Would you like a few seconds to confer with counsel before we go on?

The Witness: Well, he was merely mentioning the nontenure situation.

By Senator Richardson: Q. Dr. Langsdorf——

The Chairman: Excuse me, but I want to allow the witness time to confer with counsel.

The Witness: Counsel was advising me that technically the due process is the process before the State Personnel Board. It is our own procedures that involve our own local systems as far as nontenured are concerned; however, those are customary in institutions of higher education, but due process is required by law.

By Senator Richardson: Q. Well, why didn't you hold Mr. Duerr's tenure up? You could have held it up for a while, couldn't you?

A. No. If I do not advise the person that he is not to receive tenure by December 1st by registered mail, he automatically gets it.

Q. In other words, you cannot come back two or three months later and reinstitute that?

A. No.

Q. It automatically——

A. Automatically——

Q. That's all there is to it?

A. December 1st, that's right. December 1st is the automatic date.

The Chairman: Senator Walsh expressed the desire that the Senators get tenure.

The Witness: I'd like to have the president get tenure too. I haven't any tenure as president.

By The Chairman: **Q.** I have a few questions here, Dr. Langsdorf. People are entitled to opinions, and I am just asking for your opinion. In your opinion, is *The Beard* in the mainstream of drama as has been stated?

A. I really am not competent. I don't know drama. I don't attend it very much. I didn't attend this, and in fact I had so little time that I haven't attended any of our dramas this year. I really am not competent to say. I did, however, review after the charges originally were made about *The Beard*, I did get ahold of all of the reviews I could of the play from *Time* and *Newsweek*, *Saturday Review of Literature*, *London Times*, *New York Times*, *Los Angeles Times*, *Time* magazine, *Newsweek* and so on; none of them really said that they were particularly shocked about it. One or two of them were favorably impressed. Almost uniformly, however, they said it was dull, childish and repetitive.

Q. You can't say then in your opinion whether it's in the mainstream or not?

A. No, except the general view of the reviews was that it wasn't very good.

Q. And again, just asking for your opinion again, you have read this script of *The Beard*?

A. Yes, I have.

Q. I'm sure you have by now. In your opinion now, would it be proper for this play to be presented on a tax-supported college campus?

A. I am very personally very much offended by it. I think it's very unlikely that it would be performed again on our campus because I think if you will read the statement of academic freedom and responsibility which is the statement of the A.A.U.P., and which has been unanimously endorsed by our faculty, it states that the faculty in pursuing their responsibilities must recognize, must show due restraint and respect for opinions of others. This is part of their responsibility. At the same time, they have the responsibility to seek the truth.

Now, there would have to be overwhelming educational merit now to balance against the damage to the opinions of others which would be forthcoming. Therefore, I think I cannot speak for the faculty committee, but if someone else tries to repeat that, I would bring disciplinary charges and I believe that the faculty would find that the primary purpose here was offensive to the community.

Q. In other words, in your opinion, *The Beard* is not at this time a proper play to be presented on a tax-supported college campus; is that correct?

A. I didn't quite say that. I think this is for the profession to decide. I believe that it would be improper to be performed again after the reaction that we have had here in this community.

Q. Assuming there had been no reaction, would you feel that it would be proper for *The Beard* to be performed on a state college campus?

A. I would have to look to the professionals to decide this. I know there were many people in the faculty who were offended, just as people in the community were offended.

Q. You have no personal opinion?

A. I would look to the professionals. I cannot—I don't think any one individual can set himself up as a censor to decide what is appropriate.

Q. I was not suggesting that you set yourself up as a censor, I was asking for your personal opinion.

A. I, personally, don't like it.

Q. But you personally will not say whether or not in your opinion it should or should not be presented on a tax-supported campus?

A. No, I personally think that this has to be decided by the professionals.

Q. Let me ask you a question about *The Dutchman*. You are familiar with the script of *The Dutchman*?

A. I read it after it had been called to my attention.

Q. In your opinion, would this be a proper play to be presented on a tax-supported college campus?

A. The extracts which were read appeared to me to be practically the only objectionable parts of the play. The play is about a less desirable side of American society. I have had a check made as to where else it has been performed, and I find that it has been performed at many other public and private institutions, including an Oakland public junior college in the Oakland Auditorium without apparently any reaction against it.

Q. I'll have to confine you just to an answer?

A. All right.

Q. In your opinion, is it or is it not proper——

A. In my opinion, while I am offended by some parts of it, I think personally it's a play that's an educational experience of value.

Q. In connection with the *Free Press* which has apparently been sold on the campus, are you familiar with the excerpts of the *Free Press*?

A. I heard the excerpts given yesterday, and may I briefly answer the question——

Q. Would you answer the question first, are you familiar with it?

A. Yes, I am familiar with that.

Q. Are you familiar with the fact that it has been sold on the campus?

A. I first was aware of that, frankly, when Senator Schmitz' administrative assistant went to Dr. Shields and asked him about authority for that.

Q. You are familiar with the fact that it has been sold on the campus?

A. Yes, I am.

Q. In your opinion, is this proper material to be sold on your campus?

A. I have no basis of whether or not I do—that particular part, I would resent having on campus, on the other hand, the paper as a whole has ideas; I assume, which are challenging, and whether mostly I would object to them, however they do have ideas which are challenging. However, I would like to refer to the provisions of Title 5 of the Administrative Code which means that I cannot prevent the sale of this on the campus.

Q. For your information, Dr. Langsdorf, we asked Legislative Counsel the question—“You have asked for our opinion concerning the person or persons who would have the authority to prohibit the sale, on a California state college campus, of obscene or pornographic literature.

“In our opinion, the president of a particular California state college has the authority to prohibit the sale, on the campus of the college, of obscene or pornographic literature.”

So according to our Legislative Counsel's opinion, you do have the authority?

A. That's correct, if it's obscene or pornographic; however, that appears—and I picked it up once and read it once—that appears on every street corner in downtown Los Angeles, so I would assume it is not obscene or pornographic in terms of law.

Q. In other words, you could truthfully say that it doesn't seem to be obscene or pornographic to you.

A. I would say that it appears that the police have determined that it is not obscene or pornographic, and only the court can really determine that. If it is determined by the court that it is obscene, I would certainly rule it out.

By Senator Richardson: **Q.** Do you mean by that, Dr. Langsdorf, that it has to be a court determination on every piece of literature that comes on that campus before you're willing to make a decision?

A. I think that—counsel informs me that if I have reason to believe that this may be ruled obscene by the courts, if there is an indictment pending or something of that sort, I can so act, but other than that, I would have to wait for a legal determination.

By the Chairman: **Q.** This being the case, suppose we, the Legislature, were to enact legislation which would give you the power to exclude material from your campus that you felt would be offensive to your people or the community, or perhaps in your opinion, might detract from the moral climate in which you wanted to conduct your campus? Suppose we were to enact this type of legislation? Would you be in favor of it or would you oppose it?

A. I am concerned about the possibility that there might be brought on campus many things that appear in downtown bookshops which obviously no one would think would have any educational value. So far we haven't faced that particular position. I would certainly feel that nothing ought to be excluded from our libraries which our educators or faculties or librarians feel should be in the library, but as far as

permitting off-campus agents to come on the campus to sell something which none of us on the campus feels is of educational value, I would rather feel that that would be desirable, personally. I have not given this, however, great thought.

Q. In other words, you might support in principle legislation which would give you authority to exclude something for sale, some off-campus material, for sale in your snack bar or something like that? You might favor legislation that would give you this power?

A. Yes, provided this is with consultation with the academic community. I wouldn't want to be the only one to decide whether something would or would not be proper.

Q. You wouldn't want the decision, in other words, to be up to you?

A. I think it could be with the campus.

Q. You would want it to be up to somebody besides yourself?

A. I would like to be included in this.

Q. How many people would you like to have?

A. I would want to consult with the faculty council and have the faculty council designate a committee—I have the greatest regard for our faculty council and for their judgment—

Q. Well, we're thinking in terms of legislation and we're trying to find out if we could enact legislation; would you favor or oppose it? So assuming there was a committee, about how large would you say they should be?

A. I think I could very well have a decision provided I were advised by the faculty.

Q. In other words, the final decision would be yours?

A. On advise of the faculty.

Senator Richardson: That sort of reminds me of an old adage from the latter part of the 17th century where a count saw people rushing by the door and stated, "They are my people. I am their leader. I must follow them."

The Chairman: Senator Schmitz has arrived, and has a question.

By Senator Schmitz: Q. Yes, my question has something to do with the whole general idea of academic freedom. I wanted to ask Dr. Langsdorf if he feels that there is any difference or any qualification on his generally stated principles of academic freedom between academic freedom at a tax-supported and academic freedom at a non-tax-supported institution. In other words, he gave some broad principles for academic freedom yesterday, and my remarks were that when you have the tax supported ingredients, it puts it in a different light.

Now, do you feel that academic freedom should be qualified on a tax-supported campus?

A. No, I do not. I think that academic freedom is one entity; the academic community is an entity. I think the imposition of controls, other than those which a responsible faculty themselves maintains on a tax-supported institution, as in contrast to a non-tax-supported institution—I don't know what they are, because all of the private colleges do get tax support one way or the other—but if that were the case, then the faculty on a tax-supported institution would be second-class citizens. They would not be able to investigate; they would not

be able to challenge ideas; they would not be able to do some of the things which people in a non-tax-supported—theoretically non-tax-supported school should do.

Q. Then there really would be no advantage in teaching at a private institution, would there?

A. No, I think our faculty today, the type of faculty we have, are not dependent on their employment in tax-supported institutions. They are qualified to go out of state or to non-tax-supported institutions any day they want.

Q. Now, the courts have held, as you undoubtedly know, that whenever money is furnished or whenever tax-supported funds are used, that the furnishing authority has the power to control. Do you feel that this is not to be followed—this principle is not to be followed in education because of the principle you just stated, a tax-supported institution should have the same basis of freedom as a non-tax-supported institution?

A. I think the power to tax is the power to destroy. I think that if the Legislature and the State of California——

Q. Well, we're not talking about the power to tax, but the power that goes along with the giving of that tax money.

A. I believe that if restrictions are imposed on tax-supported institutions of this sort on academic freedom, then I think in effect, public education will be destroyed.

Q. I think you do see the quandary we find ourselves in. We have academic freedom which is a tradition in the academic community, and on the other hand, we have the Supreme Court decision that says when you furnish tax money you have the power to control that to whom you give the money. Now, I'm just wondering in which direction—you would undoubtedly resolve this in favor of academic freedom that is in favor of the court decision saying the furnishing agency has the power to control?

A. Yes. There are—counsel has pointed out several volumes of the Education Code and the Penal Code that applies to our public institutions; however, they do not limit academic freedom, and in fact, each, I understand I have read that each of the nine Justices of the Supreme Court of the United States has indicated at one time or another that they would constitutionally protect the academic freedom in public institutions.

Q. Do you think that the courts would ever hold that the citizens have an obligation to furnish the funds, even if they disagree completely as to what the funds are to be used for?

A. No, I do not.

Q. Thank you.

By Senator Richardson: **Q.** Just one other question, Doctor. What if Professor Duerr put on a play *The Beard* or the play *The Dutchman* again? What would you do?

A. Well, I would like to separate those. As I look at the play *The Dutchman*, I think with the exception of a few offensive lines, which were taken out of context, the play is not a bad play. That's my personal judgment. I'm not a drama critic.

Q. If a student asked to put it on again and Mr. Duerr gave the all right to it and Dr. Young did also, then you would go along with it?

A. I would. Now, as far as *The Beard* is concerned, I think this is an entirely different matter. That is extremely offensive to me from beginning to end. It has offended the community. If there were another attempt to put that on, I would bring charges against Professor Duerr because I would feel that, under the circumstances, and after what has happened, this would be primarily an intent to affront the community and a violation of the statement of academic freedom and responsibility which is supported by the AAUP.

By Senator Schmitz: Q. President Langsdorf, Chancellor Dumke stated that his solution to the problem would be to turn the solution of the problem over to the faculty. From your statements today and yesterday, I would assume that you agree with him on that; am I correct? Let me rephrase that. You have heard the testimony of the various persons of the staff yesterday and today. In light of that testimony, do you agree with Chancellor Dumke that a solution should be sought with the faculty?

A. I do. We have in higher education, particularly at the upper division and graduate level, most of our students, and most of our students by far are in those groups—we have a very highly specialized, professional educational program. Only the experts in the field really are competent to make a judgment as to what is appropriate for education and what is not. I would not feel that either I or anyone else could make those judgments.

Q. This is in light of your previous statement about there's no difference between a tax-supported institution and a non-tax-supported institution; therefore, the experts in the field should decide?

A. Yes, sir.

By the Chairman: Q. Dr. Langsdorf, there was some tax-supported money spent on the production of *The Beard*; am I correct? Let me preface this—

A. I don't know the facts. I understand there was a very minimum of cost, but I have not investigated this.

Q. Let me say that much of it represents the teacher's salaries, heat, lights in the hall and so forth, so in your opinion, there probably was some tax money spent?

A. Oh, yes.

Q. I agree with that.

I bring that up because Dr. Duerr stated yesterday that there was not one cent of tax money spent and it was hard for me to understand that.

A. I assume he was referring to royalties or something of that sort.

Q. Since there was tax money spent on *The Beard*, and since investigation shows that neither the principals were members of the student body, how do you justify the fact that tax money was spent on *The Beard* in spite of the fact that no students were given opportunities to perform?

A. As I understand the nature of the course, it's an advanced course in directing, and its purpose is to provide advanced educational expe-

rience for student directors, so the director in each case gets his actors where he may. The acting experience in this case is not part of the education.

By Senator Schmitz: Q. Dr. Langsdorf, yesterday, it was testified—when Mr. Gordon was testifying—that he took this directing course several times.

A. That's correct.

Q. Are there any other areas in the college where this procedure is followed, where a student can take a course several times—he must have taken it about three times.

A. Yes.

Q. Directing six plays or six other plays than this one, so maybe he would have taken it four times?

A. Yes, Senator Richardson asked that before you came in. Yes, there are several of these production areas. This is used—choral, band, orchestra, some aspects of drama, where a repeat is a progressive experience and has an educational value.

Q. Is he then graded on a curve along with the other students who are taking it for the first time? I'm just wondering how the grading situation goes?

A. I really can't answer that. You would have to ask the professors.

By the Chairman: Q. Speaking of an error having been committed—you've mentioned that an error admittedly was committed—was this error committed in the selection of the play or was the error committed by the fact that the press and public were given access? I would like to verify this.

A. My original announcement with regard to this was on the assumption that it was in both cases because Mr. Duerr had indicated, while he didn't himself, like the play and thought it a dull and poor one, he had allowed the student to proceed anyway. I felt that this was not sufficient justification in view of the nature. There have been additional reasons given since which undoubtedly may have been in the back of Mr. Duerr's mind which might qualify that.

The second thing was that I felt that he did not maintain the proper controls because in a clinical experimental situation—and there are many in colleges and universities—persons who are not prepared will be shocked. I felt there was a mistake made in control of which he was not able to maintain.

May I say one other thing. This question of tax-supported or non-tax-supported and whether the public should really determine what goes on—perhaps one analogy which would be appropriate would be in the state hospitals. The state hospitals are maintained by the state, and yet I do not believe that the Legislature or the people of the state would expect that the surgeons there would not do the same sort of thing that would be done in private hospitals. The question of the heart operation and so on. Many people will be offended by this sort of thing, and yet I don't think the people want to limit what goes on in our hospitals just because it's a state hospital.

Senator Schmitz: Well, Mr. Chairman, I would like to comment on that just by way of delineating the difference between medicine and education in general. If I understand the history of education in this

country, the right to educate resides with the parents who has turned over this right—not turned over the right, but has exercised this right through—in the local case, the local elected school boards—and in higher education, elected officials—I don't think this is comparable in the field of medicine where the right—we have held, for example, legally that a parent can't kill their child by letting the child die without medicine, and I think that is a completely different field, but in the field of education, the right to educate—and the duty—still resides with the parents or the individual, if he's of age, and I think that that is the special distinction that is made in the two fields.

By Senator Richardson: Q. Just as matter of curiosity, you believe, Dr. Langsdorf, that the responsibility of the educational institution, such as state colleges, is to create a moral environment or basically support the moral environment that exists?

A. Could you be more specific?

Q. In other words, educators, in my conversation with them, are ones who believe that through the instructional work that they do as state colleges, they help create the environment in which we live. I think that would be a fair statement. Obviously, since the amount of influence that they do have over the students, we must assume that influence is there. So what I am trying to say is: Do they believe that it is a part of their job to help to create the moral environment or is it more their responsibility to support the existing climate?

A. I'm not sure that I can answer that just yes or no. I might make these two comments: First, that by the time young people arrive at college, their moral characters are pretty well determined. We have a number of studies which show that what happens in a college has very little influence on the moral character of the student. If they're bad, they already are bad and if they're good, they already are good. The college level has very little determination actually in that regard.

Secondly, I think if you mean that the college should not challenge the existing mores and existing customs, I think it is the function of higher education to investigate and challenge everything. I think that which is valid would stand up.

I agree with Thomas Jefferson, again, as I mentioned earlier, that error should be tolerated as long as reason is free to combat it, and I think it's the function of higher education to examine all issues and all aspects of society so that they will prove themselves. And I have full confidence in those things that are right and moral will do so.

Q. Dr. Langsdorf, you stated that you don't believe that they have much impact on the moral level of the youngster once they get in school?

A. Once they get into the college level.

Q. I am curious about this because, basically, in our system of government we are taught—and the community in which we live—we're taught to respect the teachers and respect our institutions, pay attention to them, et cetera, and start suddenly when the student gets up to the college level, that respect is very much there, and it's a high responsibility on the part of the instructor because let's say an 18-year-old is quite receptive by that time by their very conditioning as to what goes on at the college level and to accept this authority which does exist among the professors; don't you agree?

A. I think the primary authority of the professor is not the indoctrination of the student, but to educate the student to look and examine and use logical means to determine what is truth, the search for truth. This is the primary objective of higher education, and I think the individual student should look to the professor only in that regard and not as the one who decides ideas and what is right and wrong. I can give—I don't have here, but we have a number of studies, very comprehensive studies that have been made which show that by the time the student arrives at the college level his moral standards are pretty well set and they are not changed by anything that happens at the college level. I'm not talking about the lower level; I'm talking about the college level. But the one thing that the college should insist on is intellectual honesty in the search for truth.

By the Chairman: **Q.** Dr. Langsdorf, then you would oppose legislation from the state level designed to prevent a recurrence of a performance of *The Beard*?

A. Yes, I do, because I think it would be a bad precedent and restrictive. I think our own faculty, our own community, has learned through this experience that we need always to be alert to affronts to the community. We may at times affront the community, but if we do so, I think that we ought to look at this carefully beforehand and make sure that there is educational benefits to be derived which would more than compensate for the affront that would be given.

Q. You would also oppose legislation allowing the press access to campus activities?

A. I have no particular answer in that regard. The faculty council could, of course, could exclude the press; they have never done so. The associated student body has never done so until this time. I think that it is possible there are times when there can be, as Mr. Chilton indicated, times when the students can be much more frank without the press there. I assume that on this occasion they felt that they might ask questions which would be embarrassing to me and they didn't want the press there to embarrass me. I said nothing which I have not said elsewhere publicly. So I would be somewhat ambivalent about this. I don't personally—we've had wonderful relations with Jim Brock. He's an excellent reporter and I have only the finest things to say about him.

Q. You would however oppose legislation to allow the press access to any and all campus activities?

A. I think so. It might interfere. It might be an extraneous intervention sometimes—not that there's anything to hide—it's just that it would prevent some of the flexibility of some of the discussions which you'd like to have go on, not that anything that happens there should not be known to the press or given to the press.

Q. What about legislation to allow the press access to any public performances that you put on, plays such as *The Beard* and so on?

A. I certainly would have no objection to the press being present at any public performances.

By Senator Schmitz: **Q.** Dr. Langsdorf, you've spent far more time in the academic community than I have, would you say that there is a

fraternal spirit among faculty members, that they have somewhat of a fraternity, a camaraderie that overpasses any ideological differences?

A. Yes and no. You will find some of the bitterest and sharpest conflicts of opinion and ideas among faculties that you will find anywhere. The faculty member is almost notoriously one who disagrees with other people and argues with each other.

Q. But this fraternal feeling is sharpened or quickened when an attack from the outside occurs?

A. Yes, if this becomes an attack or they feel is an attack on academic freedom, they will unite.

Q. Do you think this quickening of the fraternal spirit might have a tendency or could have the possibility or tendency to override reason at times?

A. This is a hypothetical situation—I just——

Q. I'm just asking if you think it's possible.

A. I think it is possible, yes.

Q. So this might be something to keep in mind when quoting Jefferson's error be allowed as long as it can be——

A. There is reason to combat it.

By Senator Richardson: Q. I was just curious, Doctor. What's your opinion of this: "Knack is an exercise in seduction." Is that typical?

A. I think that is probably typical of most news media which try to advertise and get attendance.

Q. This is a college publication?

A. I understand this is rather a farcical thing. The college students are pretty adult. I know that sex appears in almost every play and movie, except maybe Walt Disney Productions.

Q. Maybe that's why he's doing so well in sales.

The Chairman: Thank you, Dr. Langsdorf for your testimony.

Senator Schmitz has indicated his desire to recall Dr. Duerr to the stand for a moment.

EDWIN DUERR,

having been previously called as a witness, and having been previously duly sworn by the chairman, testified further as follows:

The Chairman: Mr. Duerr, you were sworn in yesterday. You are still under oath.

By Senator Schmitz: Q. I was going to say I called you up because we had TV time together last night and I wanted some more.

A. I didn't see that.

Q. Seriously—Dr. Duerr, how many hours per week do you teach?

A. I think I teach about 13 to 14.2 or something like that.

Q. How many classes is that?

A. Four classes.

Q. Three-unit classes?

A. Yes, but I do extra work with graduates and laboratory and, of course, I work every Saturday and Sunday here.

Q. The other thing was—you indicated there is a difference between an experimental play and one that you put on for public consumption, right? In other words, you have two types of plays, one in which you are experimenting with a new style and so forth and one in which is open to the public?

A. Many of the experimental ones are open to the public. All of them could be.

Q. But basically you have one type that you advertise to the public and one that is just for the classroom?

A. Because these are not finished productions at all.

Q. The one you showed last week, would you indicate that is was shown three times—what was that production?

A. You mean the name of the play?

Q. Yes, sir.

A. *The Swamp Dwellers*.

Q. Was that an experimental play?

A. That was put on directly in class.

Q. One thing that struck me, and I say this in all seriousness, have any of these experimental plays ever had a theme other than sex? Do you remember one that had a theme other than sex?

A. Other than sex?

Q. Yes. I mean, all of them that we have talked about here so far have had sex as the theme.

A. Well, that was your choice, wasn't it?

Q. What do you mean it was my choice?

A. I didn't bring up the title for this discussion.

Q. We asked the director what plays he produced and Senator Richardson said that the only one that didn't seem to have sex was Shakespeare and he said that Shakespeare had sex too.

A. Senator Richardson was in error because the Molière play was not a sex play.

Q. Excuse me?

A. The Molière play was not a sex play, so he was wrong.

Senator Richardson: Then I stand corrected.

The Witness: No, I am saying that you can call everything sex plays.

Senator Schmitz: Not Walt Disney.

The Witness: Like *The Swamp Dwellers*, it's a Nigerian play about Nigerian people who know nothing about what is happening in the world around them.

By Senator Schmitz: **Q.** One reason I was trying to find out what the play was—for both the record and for the benefit of all—I didn't want the impression if it was not true, and if it were true, I wanted the impression. If it was not true I didn't want the impression, but we seem to be dealing with nothing but a series of sex plays.

A. Sometimes it seems to me, after listening for a couple of days, that you are investigating not a state college, but you are investigating drama.

Q. No, I won't go into detail on some of the background investigation, but we are not—we have tried to emphasize, and I am trying to distinguish even here today the difference between—and we have tried

to delineate from our background investigation and emphasize what I have tried to say here only where the state and the taxpayers have something to do with it. So we have investigated a lot and found a lot that we could have brought up here, but we are not. We are only trying to limit it to where we have potential legislation or where we might have potential misuse of public funds.

The Witness: Well, could I ask you, Senator. Some of my best friends are maintenance men. There was a maintenance man testifying the other day—I love him because he loves to go to plays—he found a ticket in the parking lot.

By Senator Schmitz: Q. He's also a taxpayer.

A. Yes, so am I a taxpayer. So are all kinds of people.

Q. So he was here as a typical taxpayer.

A. We're all taxpayers. I am trying to follow you when you are saying that my maintenance man, my teller at the bank, the waitress in my town—I love them all—suddenly they are experts on every subject at the college?

Q. No, as a matter of fact if we go back to Dr. Langsdorf's analysis where he compares it to medicine, we might say—let's take a hypothetical case where you would have a Catholic community that had a tax-supported hospital that was becoming an abortion mill. Do you feel that they would have the proper right—despite the fact that none of them are doctors, to withdraw funds from the public hospital?

A. If you are trying to say that the people of this community run the college, the state runs the college, not Fullerton; right?

Q. Yes, but the taxpayers—

A. If you were interested in the subject of art and drama, why wouldn't you go, not to maintenance men, why wouldn't you go to artists of all kinds in the community—

Q. Well, we're both looking at this in a different light, Mr. Duerr. You're looking at this in that you are the expert and therefore you should decide.

A. No, no, no, I am not saying that.

Q. I would like to distinguish here between—you see, I disagree with Dr. Langsdorf. I do feel that academic freedom should be tempered once you accept government funds.

The Chairman: Senator Schmitz, let him have an opportunity to confer with counsel.

By Senator Schmitz: Q. So that you see I feel that there is a difference, that academic freedom is one thing—when you start your own school and your own college, and another one when you ask the taxpayers to support it. Once you ask for those funds—if you impliedly ask for it—you might say that you have never personally asked for it, but by accepting the job on a state college campus you're asking the taxpayer to pay your salary—once you do that, that maintenance man has something to say where his money goes.

A. He may not be a good judge of what is a good play or painting.

Q. No, he is not a judge in drama, but he's a judge of where his money goes.

A. Well, that's right. There's not one professor any place that wouldn't agree with you, wouldn't want to cooperate with you in any way. We don't set ourselves apart.

Q. You see you are using all your arguments in the field of pure academic freedom——

A. No, sir, no sir. I deny that.

Q. And I am saying that once you accept that government fund, you've got to take—as far as you're concerned, you would consider it a penalty—all the penalties that come along with it.

A. We want to be responsible to responsible people. There is no other aim in life.

Q. All right, the responsible people in this case are the people that pay the taxes, even maintenance men.

A. People would like to be responsible to you and listen to your comments.

By Senator Richardson: Q. Mr. Duerr, if a student came to you, would you put on *The Beard* again?

A. I told you yesterday that I would not.

By Senator Schmitz: Q. You would not do it because of the furor that is involved or you would not because it's a bad play for educational purposes?

A. Because of the furor it caused.

The Chairman: Anything further?

The Witness: I have one piece of evidence, Mr. Chairman, that I forgot to introduce the other day—an affidavit, may I——

The Chairman: What does this relate to?

The Witness: It relates to the wearing of two pair of pants during the play. It's an affidavit signed by the girl who dressed her every night.

The Chairman: I think we've already had the girl's testimony.

The Witness: No, this is another girl. I forgot to do it. It's an affidavit.

When the young lady in question was on the stand, Senator, I don't recall anybody in the Senate asking her about the pants. You asked a lot of other people, but the girl who wore them——

The Chairman: It appears to the chairman and the members of the committee—we have discussed this point pretty well at the time, and that's the reason we didn't ask the question.

The Witness: Then the committee is saying then that they're satisfied that there was another pair of pants?

The Chairman: The committee is not making a commitment what it's satisfied with. It seems to us that we had sufficient testimony on both sides as to this.

The Witness: Then you won't let me introduce——

Senator Schmitz: I think we can accept it. I think one of the dangers here from reading the college newspaper—the defense of the whole thing I think has been set forth as trying to prove there was an actual act committed, and as far as I am concerned, that's not my concern at all.

The Witness: That was part of the fact sheet which your committee authorized. We felt that should be cleared up because that's the impression that some of us had.

Senator Schmitz: We can accept this, and as far as the fact sheet went, it didn't make much difference to myself or most of the Sena-

tors I talked to, whether it was—just like a stage kiss or a real kiss—but the fact that what was being portrayed by this act, witnesses from both sides have agreed that the idea put forth was a case of oral copulation. This was the thing that was supposed to be put forth. Whether it was actually committed or not, as far as I am concerned, I could care less.

The Witness: Well, if I had read that fact sheet, I'd be down here in 10 minutes. I don't blame the gentlemen here, but the fact sheet is in error.

By Senator Richardson: Q. But that obviously was the act that was being portrayed?

A. But that's not what it said in the fact sheet. It said it actually happened on the stage. That's a lie.

Q. That isn't the question I asked. We'll accept this and allow that to be entered—no problem.

A. It's in the fact sheet.

Q. As the director of the play, and as the one who was involved in the production of it, that is exactly what was to be projected to the audience, was an act of oral copulation?

A. Simulated act, yes, but I don't know—

Q. What's the difference between a simulated act of oral copulation and an act of oral copulation?

A. What's the difference? You don't know?

By the Chairman: Q. Senator Richardson asked you—Senator Richardson's question was: Were you endeavoring to portray an actual act of oral copulation or were you endeavoring to portray an act of simulated oral copulation.

A. I don't understand the question.

Q. Was your effort to convey actual oral copulation or was your effort to convey a simulated act of oral copulation?

A. I could go beyond that. It was an effort to emulate symbolically and poetically oral copulation.

Q. You can't answer the question Senator Richardson asked?

A. No, it doesn't make sense.

Senator Schmitz: Let me ask one that will make sense—

Senator Richardson: I would like to follow through on this.

By Senator Richardson: Q. If you're projecting a murder on the stage, and there's a great big difference between projecting a murder to carry on the plot of the play or projecting a simulated murder which, in fact, might not be happening.

A. You're mixed up, Senator. You only have to project the murder, you don't have to simulate the murder.

Q. Simulating a murder could be part of the play; could it not?

A. Yes.

Q. All right, was in this play simulated oral copulation a part or was oral copulation a part of the play?

A. I just don't know.

Q. As the producer you just don't know?

A. I just don't know.

Senator Schmitz: Mr. Chairman, I'd like the witness to quote from the fact sheet where he says there was an actual case of oral copulation.

The Witness: Thank you very much, Senator.

It's on the first page, a little beyond the middle down here—here's one, the section you read from the copy the first day, "She sits on his lap—" and the rest of it, that did not occur. It was deleted from the play.

The Chairman: What part is that?

The Witness: "Harlow sitting on Kid's lap—" You read the rest of it—this was not in the play any of the three times.

The Chairman: Is this the fact summary you are talking about?

The Witness: Your fact summary, Senator.

The Chairman: Which page are you on?

The Witness: Page one. It's down about a little bit below the middle, "Harlow sitting on Kid's lap with one arm around his neck—" The next three lines, that was cut out of the script.

The Chairman: Let me understand here—according to this fact sheet, it says, "On the seventh page the following language appears—" and then it goes on quoting from the language of the play. It says nothing about what happened. It says merely this is what appears.

The Witness: Are you implying that took place on the stage?

The Chairman: Sir, I wasn't present at the performance.

The Witness: Well, are you implying to your cohorts that this is what happened on the stage?

The Chairman: I wasn't at the performance and neither were they.

The Witness: You are not answering my question, but then you don't have to.

Senator Schmitz: I think we are getting away from my question.

The Chairman: I am stating exactly what was in the play.

The Witness: Do you want to move along then—"The oral sex act then takes place—" that's untrue.

Senator Schmitz: Where is this?

The Witness: Down—one, two, three paragraphs from the bottom.

Senator Schmitz: Wait a minute, an oral sex act, this is not the oral copulation that takes place. This is an oral sex act that takes place.

The Witness: That's a lie.

Senator Schmitz: Well, you and I have a different idea on oral sex acts. In other words, an oral sex act can be a kiss, can't it?

The Witness: I don't think so.

Senator Schmitz: After all, one mouth kisses another mouth, that's an oral sex act. You said the fact sheet said that—our fact sheet said an actual case of oral copulation took place and I don't find it on the fact sheet.

The Witness: An oral sex act—all right, then I'm wrong—you find it.

At the top of the next page, "At one time the man passed his right hand up the side of her body and held her left breast." That did not happen.

The Chairman: Sir, all that's stated in the fact sheet is that this is the statement of four witnesses.

The Witness: Then I think that you are sort of misleading your colleagues.

The Chairman: All I know is what the witnesses told me.

The Witness: See, you didn't investigate the witnesses.

The Chairman: I talked to four witnesses.

The Witness: Why don't you investigate your witnesses?

Senator Richardson: You're right—you're right, not in what you're stating, but this is an investigation that we are trying to hold and we are doing it right now. This is what we are trying to do. We try to work in cooperation and try to come up with the proper information. What I am trying to say, sir, is would you hold your comments to the questions we ask you? Do you understand that?

The Witness: Yes, I understand.

Senator Schmitz: If I might just comment on this—as far as I am concerned, the statements—from what I have seen of this investigation for the last two days, the statements from our preliminary investigation come close enough for the average person, but I want to get back to my original question.

Senator Schmitz: Q. You stated that this fact sheet stated that an actual case of oral copulation took place. Now, oral sex acts and an act of oral copulation are two different things. An oral sex act can be many different things—kissing her thighs with his mouth can be an oral sex act, as far as I'm concerned.

A. It's not intended in the summary sheet to be two different things.

Senator Schmitz: Pardon?

The Witness: They're not intended to be two different things in the fact sheet.

Senator Schmitz: An oral sex act as far as I'm concerned can be a simulated oral copulation, but you said that our fact sheet stated that an act of oral copulation actually took place, and I don't find it in here.

The Chairman: Any further questions?

Mr. Duerr, you may be excused.

The Witness: You don't want my affidavit?

The Chairman: Yes, certainly, we'll take it.

The Witness: Do you want me to read it or—

The Chairman: Just gave it to the sergeant there.

Do I have a motion that be entered into the record?

(Duly moved and seconded.)

The Chairman: Without objection, it will be entered into the record.

The committee at this time would like to thank particularly the district attorney's office, Cecil Hicks and his staff for the splendid investigation work they did for us. I'd like to thank Dr. Langsdorf and his staff for the cooperation they extended to us in facilitating the investigation. I would like to extend our thanks to the City of Fullerton for allowing the use of this facility and to the police department of the city of Fullerton for the excellent service they have given us during the investigation—the secretaries that are here—the Senators that are here: Senator Schmitz, Senator Walsh, Senator Kennick was here, and Senator Richardson. This completes the investigation and the investigation is now finished.

REPORTER'S CERTIFICATE

I, Walter R. Cram, shorthand reporter, and a notary public in and for the County of Orange, State of California, do hereby certify that the foregoing proceedings were taken by me in stenotypy, and is a true and correct transcription of my shorthand notes thereof.

WALTER R. CRAM

APPENDICES

APPENDIX I. STATEMENTS ENTERED INTO THE RECORD AT THE REQUEST OF MEMBERS OF THE PUBLIC

1. STATEMENT OF SAM CAMPBELL

Holding an interest as an involuntary contributor to the financial support of California State College at Fullerton and as an inhabitant of the community, the undersigned offers the following points of reference for the assistance of the Committee and the Legislature.

1. Academic freedom, or any other entitlement of the academy, is not an issue in these proceedings. No person that this witness has encountered even questions the latitude of college faculty members "to seek truth and to speak it as they see it" as long as they do not violate other peoples' belongings and entitlements. The primary issue is whether, in light of the testimony gathered by your Committee, the Senate and the Assembly are willing to compel residents of California to continue contributions for college activities that go contrary to the fundamental religious convictions of many of those residents.

A secondary issue is whether the Legislature is willing to innovate some means whereby those Californians who dissent from college activities for moral and religious convictions can withdraw the financial sanction that the Legislature now requires from them.

The problems, as seen by this witness, is not to devise legal means for limiting faculty members, but rather to devise means for *removing* limitations upon all Californians as to the alternatives that they may choose with their educational dollar. The question is not whether to restrict choice of faculty members, but how to enlarge choice of all individuals. The question is not so much what the school ought to do, but what the *Legislature* ought to do—in light of the eye-opening testimony before it.

2. Witnesses on behalf of the State Colleges set their own limitations upon themselves when they asserted an obligation "to seek Truth and to speak it as they see it." Truth being always consistent within itself, the major contradictions that the Committee will observe in the testimony of the individual witness stand as evidence to refute such witness' sincerity, or professional competence, or both. The test of each testimony is its lack of consistency within itself.
3. As one in a community that faculty members charged generally with having a "moral disease"—the disease being described by college spokesmen as a "hang-up on sex"—the undersigned readily acknowledges that he holds this kind of activity as being a special gift from God, to be reserved for a high and holy purpose. But as prized beliefs, like valuable objects, are subject to counterfeiting, the question arises as to which class of beliefs is valid.

The problem of the Senate Investigating Committee on this matter is to find a reference line from which to survey the field in order to separate the genuine from the false.

Are all sexual practices beneficial, as certain college witnesses suggest, or is a right and wrong involved? Holy Writ (specifically the eighteenth chapter of Leviticus and the first chapter of Romans) supplies a reference line from which at least to begin the legislative discussion. The undersigned asks that these Scriptural citations, that pertain to the endurance of the State, be incorporated as a part of the Committee record. This will help to clarify which set of witnesses has the moral disease—those of the community or those of the college.

Respectfully

SAM CAMPBELL

Editor, *Anaheim Bulletin*

OUR ACADEMIC COMMUNITY

2. STATEMENT BY H. S. SAMUELS

The Fullerton State College has presented many fine plays on campus, during its existence. This in itself is a credit to the college and the community. As far as I know, these plays were all open to the public, in fact, the college wants and expects community support of these plays. From what I can gather, the college and the community has gained from this.

Then the college presents a play that is closed to the public, a play sponsored by the faculty, for which college credit was given. A play that I and many in the community consider obscene. I did not see the play "The Beard" as presented on the Fullerton College campus, I have talked to two (2) people who did see the play on the Fullerton Campus. I have read the play in its entirety. In my opinion, the play is not only obscene and vulgar, it is senseless and dull. Why such a play was allowed on campus, and for college credit, is beyond me. This is not the type of play to be associated with this community.

An "Ad Hoc" faculty committee was established at Cal State Fullerton to review academic freedom and professional responsibility of on-campus events. This committee or council endorsed a detailed account of the play's performance on campus as outlined by Dr. James Young, Drama Department head. The group did express regret that some individuals were distressed by the presentation and denied that there was any improper conduct on the part of the students, faculty or college administration.

Gentlemen; I must say with all sincerity—if this committee really believes this—I say they do not belong in our community. I say they are out of place here. Along with academic freedom, there must be academic responsibility.

Another area in relation to the performance of this play on a tax supported college campus is the immunity from the police. There seems to be an agreement between the police and the college faculty

that no police will officially go on campus without consent of the faculty. Do we have—or really want—a section of our community which is off limits to the police. Why should a tax supported college want or need immunity from the police?

One member of our community called our local police and asked this question—"If I present the play "The Beard" in my own home, would I be arrested?" The answer was yes. Do we have a double standard here between a member of our community and the tax supported state college?

Another area of concern is the permanent job tenure. Professor Edwin Duerr was awarded tenure during the controversy over the play "The Beard". Was this done to relieve pressure at the college involved? This did allow the college president to state that he could not act against the professor involved.

There must be some way for those who pay the bills to be heard. There must be some way for the taxpayer to show his displeasure of activities on our college campuses.

H. S. SAMUELS

APPENDIX II. DOCUMENTS ENTERED INTO THE RECORD AT THE REQUEST OF THE ADMINISTRATION OF CALIFORNIA STATE COLLEGE AT FULLERTON

1. STATEMENT OF DR. WILLIAM B. LANGSDORF

President of Fullerton State College

My name is William B. Langsdorf. I am President of the California State College at Fullerton.

Charges have been made that the presentation of the play, "The Beard" in our arena theater at California State College at Fullerton on the nights of November 8 and November 9 was improper and perhaps illegal, and that those responsible should have been disciplined.

This College has never tolerated, and will not tolerate, any illegal actions on the part of faculty or students. I will immediately bring charges against any who I am convinced are guilty of illegal acts. In this instance, I believe that sufficient witness and affidavit testimony is available and will be presented amply to demonstrate the irresponsibility of any charges of illegality.

As soon as I first learned on November 14, that the play "The Beard" had been given, I at once began an investigation. This shortly indicated to me that while nothing illegal had transpired, a play had been given which would be shocking to many people in the community. Mr. Ed Duerr, the instructor in the advanced class in drama directing, had permitted a student in the class, as a class exercise, to produce and direct this play which Mr. Duerr thought a poor one. Both Mr. Duerr and Dr. Young, Chairman of the Drama Department were very surprised to learn that members of the press had been in the audience. Both stated that a mistake had been made which would not be repeated. I therefore issued a public statement which I first read to them, in which I criticized Mr. Duerr, and expressed regret for any apparent affront to the community. I also expressed confidence in the future exercise of judgement by Mr. Duerr and Dr. Young.

Continuing study of the circumstances surrounding the play revealed the following: Each member of the class in Drama 470 AB, is required during the course to arrange and direct two plays in our experimental theater classroom. This is a course in drama directing. One of the two plays is chosen by the instructor, one by the student. "The Beard" was chosen by the student, Terry Gordon, age 24. When Mr. Duerr read the play he told the student he believed it a poor one. Mr. Duerr was persuaded to let the student, who is felt by the department to be very gifted, go ahead on the grounds it was a difficult play to direct and the student, who had seen it on the San Francisco stage last summer felt it would be a challenge to him. There are only two actors in the play, both man and woman being adult (aged 26 and 23) which you have already determined.

I found that it is customary to expand the class during the production of the plays, in order to secure better audience reaction, but not to open them to the public, to sell tickets, or to publicize them in the

on, or off-campus, news media. In the case of this play, because of its character, Mr. Duerr took particular precautions to avoid having in the audience those unfamiliar with trends in contemporary drama and the legitimate stage or likely to be shocked by the language and acting. Only drama students and their friends in the community were to be admitted, and by passes signed by the instructor who planned to interview proposed guests in order to inform them of the nature of the play so that they could make their own decision as to whether they wished to see something of this character. The directing class is experimental in nature. Many other college and university class situations would also be offensive to the unprepared; as for example, a medical class involving the dissection of a cadaver. There was, therefore, reason for Mr. Duerr and Dr. Young to be shocked when they subsequently learned that persons unprepared in background or orientation for such a performance had been insinuated into the audience, apparently by a faculty member who previously had not been reemployed and who had secured passes from a drama student and then used them to attract several persons who were certain to be shocked and to be vocal about it.

Mr. Duerr stated that, once he had authorized the play to proceed, he attended all dress rehearsals. The parents of both the student director and the female lead were invited and attended either a rehearsal or a production. After the play was presented, Mr. Duerr reviewed it with his class, most of whom, he stated, felt it was a poor play, though they felt the directing and acting was good.

During the process of my investigation, I learned that one of the early professional performances in San Francisco had been interrupted by the police, but the Superior Court had ruled out interference. It may be that the Court was of the opinion that simulated sex is no more illegal on stage than is simulated murder—an everyday occurrence, even on television. The play has been presented in several cities in the Bay area, and at length in New York, without other interruption. I further learned that the play had been presented to the public in a major private university in California, as well as on the campuses of two public institutions, and that at least two other university campuses had it in a class as experimental theater.

I have been urged from the first to initiate disciplinary proceedings against Mr. Duerr and perhaps Dr. Young as well. Since nothing illegal transpired, the only grounds upon which disciplinary charges could be brought would be unprofessional conduct. Only the qualified experts in the profession can render judgement in such matters. Even should they agree that Mr. Duerr made a mistake in judgement, one such mistake would not, in the professions generally, result in disciplinary action.

Both Mr. Duerr and Dr. Young are men of distinguished background and experience. I criticized Mr. Duerr both because he permitted a student to proceed with a play which he, the instructor, felt was a poor one, and because he failed in his attempt to limit the audience to persons who were prepared and properly oriented. Should Mr. Duerr and his professional colleagues maintain that a play has major educational significance, a great play, then its production may

be justified, even though it may shock and offend some people. As President of a College I must look primarily to the recommendations of qualified professionals rather than rely on self-appointed critics.

The true professional in higher education has a training comparable in depth, background, and specialization to those in the medical profession and the bar. In such professions the members alone are the judges of professional qualifications and of unprofessional conduct. In fact, we in higher education have a more rigorously repeated review and evaluation of our members than any other profession. One of the most important and time consuming responsibilities of faculty is the evaluation of their fellows, each year for four years, then every time thereafter that promotion is considered.

In addition, the faculty of the College in this past very difficult month have pursued further the question of joint responsibility. The Faculty Council unanimously adopted the American Association of University Professors statement on Academic Freedom, which will be presented later, and has recommended procedures to be used in critical situations which may arise in the future, acknowledging the assistance which the College Advisory Board may provide the President. I have adopted these as college policy. The Faculty Council also established a special committee on Academic Freedom and Professional Ethics, chaired by Dean Miles McCarthy, which has just begun a long range continuing study and has announced it will hold hearings.

The responsible conduct of higher education is not an easy thing. It requires exploration of ideas of all sorts, many very unpopular and sometimes risky for the faculty who do so. Yet our free society's life and future depend on such continued challenging and testing. This is called academic freedom; it has constitutional protection. To limit the right to explore and challenge would soon erode all our freedoms.

I believe much of the public criticism in this instance is based upon two misunderstandings. The first is the belief that our students are comparable to public school children. Only 41 of our freshmen are under 18, and of course service in the armed forces is possible at 17. The average age of our 9,000 students is over 26—in fact, nearer 27. The second misconception is that a college or university is today an ivory tower apart from the world, in which young people can be protected from the ills and the evil or dangerous ideas of society at large for four or more years. This is less true than ever before. To create an artificial environment in the college can only lead students to cynicism regarding the hypocrisy of an institution which claims it searches for the truth, and all of it. It may indeed be wiser for society to have its young adults in contact with perhaps objectionable ideas and concepts under professional supervision, where they can learn to reject them if reason does not support them, rather than to learn them in the gutter as forbidden fruit. I believe it was Thomas Jefferson who maintained that our form of free society, to survive, must tolerate error so long as reason is free to combat it.

I urge that you not contemplate restrictive legislation directed towards the colleges as distinct from society at large, whose laws we of course should and must obey. External political control could be dangerous and destructive.

It could be a precedent for further acts limiting freedom to investigate and explore, the *sine qua non* of higher education.

It would, almost certainly, result in our losing some of our best faculty. Today excellent faculty such as we have are in great demand. Many came to us from higher paying jobs and stay only because they like it here and are challenged in the building of a new and excellent institution. Nearly all faculty would resent and be repelled by restrictive legislation, aimed at them, rather than society as a whole.

It would endanger our accreditation, in which private and public institutions of more than one state sit in judgment on each other. One of the most likely reasons for loss of accreditation is governmental limitation on academic freedom. Such loss of accreditation is no light matter. Students are then not accepted on transfer by other institutions, private or public, except perhaps on probation; graduates are not accepted by graduate or professional schools. No federal funds or NDEA scholarship loans are available, nor are grants from most private foundations. Where accreditation has been temporarily lost in the past in other states, almost irreparable damage was done.

I have very full documentation, should the committee choose to have this.

Limitations on academic freedom by legislation would probably eventually be ruled unconstitutional by the Supreme Court. Justice Brennan in *Keyishian vs Board of Regents* in 1967 stated in part, "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools. ' . . the classroom is peculiarly the marketplace of ideas.' "

I urge that the details of government of the colleges be left to the Trustees and be subject to their guiding policies, and that responsibility for the educational program remain in the academic community.

2. STATEMENT OF DR. PAULINA JUNE SALZ

Chairman of the Faculty Council of California State College at Fullerton

Mr. Chairman and Honorable Senators:

I am Paulina June Salz, and I am here today as Chairman of the Faculty Council of California State College at Fullerton. The Council is comprised of 36 faculty members and 2 Academic Senators and elected by the entire full-time faculty. The President of the Associated Students is also a member. The Council represents a broad range of faculty opinion.

In accordance with the recommendations of the Association for Higher Education and American Association of University Professors for the best manner of governing academic institutions, the Faculty Council has, from the beginning of the College, played a major role in the governance of California State College at Fullerton. Its purpose is to advise the President on all matters of educational and profes-

sional policy including curriculum; academic standards; personnel procedures on selection, retention, tenure, and promotion; and academic and administrative policies concerning students. Its deliberations are slow, careful, and thorough.

The Council has held several meetings since the recent controversy developed over the play "The Beard" as the Council has been well aware of the problems and implications involved.

At the November 21 meeting, as a result of the sensational stories about the play and the misquotations of President Langsdorf in the local press, a resolution was introduced by a professor, not a member of the Council, which attempted to censure the President for criticising Mr. Duerr's professional judgment and for not supporting academic freedom. The President's reply reaffirmed his belief in both Mr. Duerr's professional ability and judgment and in the principle of academic freedom. Furthermore, he questioned if those criticising him would accept the invasion of their classrooms by unauthorized and unqualified persons. He quoted the 1966 AAUP Statement on Academic Freedom which emphasizes both the principle of academic freedom and the special responsibilities of the faculty under that principle. The resolution was unanimously defeated.

At the November 30 meeting Dr. Young requested that a statement supporting the actions of the Drama Department be sent to Senator Rodda. Three resolutions on academic freedom were submitted to the Council; as a result, the Executive Committee was requested to draft a statement for consideration by the Council on December 1. Furthermore, the Ad Hoc Committee on Academic Freedom and Professional Ethics was established and given three charges: to hold faculty hearings pertinent to the exercise of academic freedom in an institutional setting, to receive testimony and report the opinions of the faculty to the Faculty Council, and to provide a meaningful statement on academic freedom for the Council. I added a fourth charge—that the committee prepare a statement on professional ethics for the Council. There is a statement on professional ethics in the Faculty Handbook, but I felt that a restatement was needed at the present time.

At the December 1 meeting, following a reading by Dr. Young of his statement to Senator Rodda concerning the presentation of the play, the Faculty Council voted complete support of Dr. Young's statement as the expression of the Faculty Council and the faculty. In addition, a resolution supporting President Langsdorf in his defense of the faculty and of academic freedom was unanimously approved.

Following the release of the recommendations of the Advisory Board on December 5, the Executive Committee of the Faculty Council met with President Langsdorf and advised that the recommendations be implemented through existing channels of departments and faculty committees. At the December 14 meeting of the Faculty Council, the Ad Hoc Committee on Academic Freedom reported that existing machinery was sufficient to handle problems of professional responsibility. (Dean McCarthy will discuss this in this statement.) The Faculty Council passed the committee's report. In addition, the Faculty Coun-

cil unanimously reaffirmed the 1966 AAUP Principles on Academic Freedom and Tenure.

During the Christmas holiday, the Committee on Academic Freedom met and worked out a revised version of their Statement FCD 67-184 which was presented at the January 9 meeting of the Faculty Council. This statement recommends that in an *unusual* situation a faculty member be *urged but not required* to seek the advice of his department or the Faculty Council. The resulting recommendation shall be forwarded to the President who may also seek the advice of a lay committee of the Advisory Board.

The statement of the Committee on Academic Freedom was passed by the Faculty Council on January 9 and established as college policy by the President on January 10. It was also accepted by the Advisory Board at their meeting on January 15.

If the Honorable Senators will read the Faculty Council document on personnel procedures FCD 67-80, they will note that faculty members are reviewed yearly before they receive tenure, and reviewed periodically after that time when they become eligible for promotion until they become full professors. This system of continuing self-evaluation by the academic profession is more rigorous than that practiced by the professions of law or medicine.

Furthermore, the actions of the Faculty Council are clearly an expression of the view that the judgment of a disciplined professional must be allowed to stand, even if controversial, within the limits of the law and of professional responsibility. Any restriction of the professional's right to inquire, to learn, and to teach has inevitably resulted in the disintegration of the institution, the loss of the best faculty, and irreparable damage to the students and to the community.

3. STATEMENT OF DR. MILES D. McCARTHY

Representative of Faculty Council and Chairman of the Committee on Academic Freedom and Ethics of the California State College at Fullerton

My name is Miles D. McCarthy. I am before you today as a representative of the California State College at Fullerton Faculty Council and Chairman of the Committee on Academic Freedom and Ethics.

You heard yesterday from Dr. Salz how this committee was established and the Faculty Council, and therefore, I won't repeat the motion which did so establish the committee which you have before you.

I would then like to tell you something of how the committee arrived at the statement which you have. In deliberating on our charges, the committee recognized that we must first be in agreement as to the functions expected of an institution of higher learning by the people of California and secondly we must examine existing legislation and practices to determine whether any additional legislation is necessary to insure that the function of the college can be fully realized.

The committee recommended to the Faculty Council and the Council approved the following statement: "We, the faculty of California

State College at Fullerton, have a common concern, cause and purpose with the community at large; namely, the operation of an institution to discover, analyze and disseminate knowledge, and to educate our youth. The fundamental method, or tool, used in this process is freedom of intellectual inquiry. While it has been often challenged, such freedom has repeatedly been upheld as a method which is absolutely necessary to the pursuit of knowledge. Therefore, in consideration of our obligation to society, we, the faculty of California State College at Fullerton, reaffirm our determination to encourage the free pursuit of learning, and to seek and state the truth as we see it concerning ideas, art forms, issues and controversies within the framework of law. The responsibility to assure, insofar as possible, peaceful demonstrations and assemblies when ideas clash and contend is also recognized. As responsible scholars, we pledge our energies to the enrichment of society. As a fulfillment of our pledge, academic freedom is the single most important condition we require of society—if that pledge be fulfilled.

The committee recognized that (1) the professional educator is also a citizen with constitutional rights and that if he chooses to act as a citizen, he should make every effort to identify his actions with his rights as a citizen, (2) no special enclave exists or is intended within the college community, and (3) professional qualitative decisions must be evaluated by professional peers according to appropriate procedures. In order that the objectives and functions described above may be fully recognized, it is imperative that a well prepared professional faculty be obtained and that such a faculty be expected to and given every opportunity to make qualitative decisions about human talent without the constraints of special civil laws.

It is noteworthy that the faculty at California State College at Fullerton is a highly qualified group with more than 60 percent of them having earned a doctoral degree in their respective disciplines. They are, then, specialists who are devoting their time and energies to preserving, reviewing, testing and extending knowledge. Without the labors and dedication of such faculty groups, progress in our society must surely come to a standstill which may be the prelude to extinction. The faculty have reaffirmed their acceptance of the position of the American Association of University Professors, attachment 2, on academic affairs, i.e. academic freedom, ethics and responsibilities. The statement of this committee, attachment 1, is supportive of the AAUP position. The AAUP and our faculty are both well aware that no statements nor laws can prevent occasional mistakes nor incidents which will incur public disfavor. It must be recognized that seeking the truth is sometimes hazardous but that all avenues of approach are meritorious as are all pieces however small and awkward in completing a puzzle.

The Faculty Council produced its first personnel document in 1962 dealing with personnel procedures within the college. This first started in 1962 and it has been revised every year since. In 1967, the document which you have before you was prepared.

Procedures are described herein insuring the critical review of faculty by their departmental peers, their departmental chairman, the

administrative officers, an all-college personnel committee and the president of the college.

In addition to rigorous self-examination and evaluation procedures the faculty also is subject to those regulatory provisions of the Education Code, Article 2, Sections 24301-24310—that's attachment 4 in your hand.

In summary, we believe that academic faculties comprised of specialists since time immemorial have been the bulkworks against ignorance, tyranny and totalitarianism. In acting to maintain a free society, they must have a mandate to seek the truth, and have and maintain procedures for self-regulation under law.

And if I could be permitted, Senators, I should like to tell you two short incidents, one of which is personal, and one which I think is a matter of public record.

As you can find from the record, you will know I have also been trained in medical research and surgery and one time had the position of associate professor of surgery. During that time in 1952, I undertook some experiments without the knowledge of my superiors nor the chief of the hospital administrative staff. As a result of this investigation, I was invited to a hearing such as this, held in Virginia; however, it was attended by all the medical college surgeons, at which time Dr. Moyer, who was then chief, said, "This man should certainly be regulated in his experimentation—" because of things I had recommended, he was sure I was going to kill a good share of the population. Well, as it turned out, what I was recommending was the introduction of some 18 percent of the body weight of a saline solution in burned patients instead of blood. Today you will discover that in every hospital in the land that treats burns that this is, indeed, the practice. If I had been denied the opportunity to proceed with those experiments by law, this, I think, would not have come about. I think that's not true—someone else, indeed, would have done this, but I would urge you to be very hesitant in trying to enact legislation to control our thinking.

4. STATEMENT OF DR. DAVID MALONE

Professor of Comparative Literature and Chairman of the English Department
at the University of Southern California

Mr. Chairman, Honorable Senators:

My name is David Malone. I am a Professor of Comparative Literature and Chairman of the English Department at the University of Southern California. Perhaps I should also mention that I teach both undergraduate and graduate classes in European drama.

I appreciate your letting me appear before you, because the issues involved in the creation of this Committee and in the Senate's charge to this Committee are at the very center of my own professional life.

Literature in all of its forms—poetry, fiction, *and* drama—is concerned with everything in human experience. The very essence of literature is to provide symbolic re-creations of human experience in ways that will suggest some order and meaning in that experience. It is for this reason that students in college are required to spend so much

of their time reading literature: for literature is the most effective means of discovering what it is to be human, of coming to an understanding of the fundamental patterns of human behavior and the traditions of a society, and—indeed—of learning one's own self.

No significant literature can exist which arbitrarily excludes important areas or aspects of human experience. All human behavior, all human values, all human attitudes, aspirations, perversions, frustrations, achievements, emotions, and thoughts are the indispensable raw material of literature. Human beings everywhere—in Los Angeles or New York, in Fullerton or Sacramento—are capable of vile, tasteless, cruel, degrading, repulsive, stupid behavior, just as they are capable of noble, graceful, compassionate, enlightened, intelligent behavior. Literature can no more restrict itself to the one kind of behavior than it can to the other and remain honest.

Given this essential nature of literature—in all of its forms—the teacher of literature in an institution of higher education has an inescapable obligation to himself, to his students, and to society to engage in the study of literature with total honesty and with a commitment *only* to explore in literature what is true in human experience and human nature.

Contemporary literature reflects contemporary human behavior in our society. Our society is manifestly characterized by the decay of traditional values, by the dehumanization and isolation of the individual, by frustrations for which there is no remedy, by a morbid fascination with violence and physical pain, by an excessive preoccupation with sex, and the substitution of sex for all other values, by the pollution of the air, the earth, and the waters with the excrement of our machines. These are realities in contemporary life; these realities are part of the raw material of contemporary literature. The college teacher, or student, who pretends that things are otherwise is guilty of dishonesty and of the worst of all forms of perversion: the perversion of the intellect.

One can find in literature the symbolic representation of every imaginable human action and aspiration whether a particular symbolic representation is justified by the context of the whole piece of literature will depend upon the artistry of the author, or in the case of a play perhaps of the director. Literature, particularly the drama, does often shock the public: frequently the shock results from the author's compelling the public to see itself as it really is; sometimes the shock comes from the author's treatment of subjects that society regards as unmentionable; and sometimes the shock is caused simply by literary or theatrical ineptitude. But one could argue that the greater the shock to the public, the greater the obligation of the college teacher of literature to deal honestly with that particular poem, or novel, or play.

Given the nature of literature and of the college teacher's obligation he *must* be free of restraints on his right to select and teach the individual works of literature which will help his students discover the nature of themselves and their world. Any restraints upon his professional freedom and discretion can have only one effect: the perversion of the fundamental purposes of higher education. Just suppose the college instructor were legally compelled to meet inquiries from

students with some such answer as this: "We can't read or discuss this novel, or try to produce this play, even as a classroom exercise, because it might outrage the public, or even worse the Legislature." The students would then leave the classroom, go to a book store and buy the book, or go to a theatre and see the play, and the net effect would have been—what? The student would quite properly conclude that his teacher and his college were the puppets of some other agency, and that all the pious professions about "the search for truth" were simply an example of the hypocrisy of the "establishment." The instructor himself would judge any piece of literature that might reveal something about man in contemporary society—not as a piece of literature—but as something that might offend or please the Legislature. And the institution, the college—in all of its policies and decisions—would inevitably think first of what the Legislature would want, and only second of what the commitment to Truth demanded.

I am *not* suggesting that colleges and universities, professors and students, have any special status. Rather I am insisting that they can fulfill the purposes for which you gentlemen appropriate hundreds of millions of tax dollars *only* if they are concerned with what is true and honest. As soon as college teachers or deans or presidents decide educational policy on the basis of the effect it will have upon a legislator or a group of legislators, they have condemned that institution to mediocrity or worse.

If present laws defining and proscribing obscenity or indecent behavior are inadequate then they should be changed within the constitutional framework. But any law should apply equally to all citizens and throughout our society. The very idea that a certain pattern of behavior should be legislated for college students and their teachers, apart from what is allowed or prohibited in society as a whole, this very idea constitutes an immediate attack upon the fundamental purposes of higher education. How can teachers or students possibly pursue Truth if they are told by the state, "We allow all other citizens to do and say these things with impunity, but you on the university and college campuses will be in jeopardy for doing or saying what you might do or say if you were any other citizen."

You gentlemen are, I know, deeply concerned over the tensions and upheavals that threaten our society and the values that give meaning to our lives. We in higher education—and I might suggest especially those of us concerned with literature, including the drama—have vested our whole lives in the heritage of the past. So deep is our commitment to traditional values that we are never completely certain that we have found The Truth. But our commitment to the search for Truth is total. For that reason, any restraint upon that search, any attempt to erect Legislative Curtains beyond which inquiry may not go, any intimidation of teachers or students because this or that quest proved shocking to the public when a fragmentary, out-of-context, sensationalized report was given to the public, even any threat that funds will be cut off if they are used conscientiously in an attempt to explore the human condition—any and all such restraints can only attack and potentially destroy a system of public higher education that has become the wonder of the world.

5. STATEMENT OF THE FACULTY COUNCIL COMMITTEE ON ACADEMIC FREEDOM AND ETHICS OF THE CALIFORNIA STATE COLLEGE AT FULLERTON

Mr. Chairman, Honorable Senators and Gentlemen :

My name is Miles D. McCarthy. I am before you today as a representative of the California State College at Fullerton Faculty Council and chairman of the Ad Hoc Committee on Academic Freedom and Ethics.

We, the faculty of California State College at Fullerton, have a common concern, cause, and purpose with the community at large, namely, the operation of an institution to discover, analyze, and disseminate knowledge, and to educate our youth. The fundamental method, or tool, used in this process is freedom of intellectual inquiry. While it has been often challenged, such freedom has repeatedly been upheld as a method which is absolutely necessary to the pursuit of knowledge. Much more is to be achieved by encouraging the unhampered exercise of this freedom than by restricting it in any way. By contrast, totalitarian forms of government have a history of consistently limiting freedom of inquiry.

The faculty considers the extended class presentation of Michael McClure's play, "The Beard," on this campus, November 8 and 9, as an instance of the exercise of freedom of inquiry. As in all cases of free inquiry on this campus, this instance has taken place within the framework of law.

The faculty of California State College at Fullerton seek no unusual prerogative or immunity. Our position is that of the American Association of University Professors as stated in their handbook, *Academic Freedom and Tenure*, and the State Academic Senate's recommendation on professional ethics (FA-252), of May 19-21, 1966. Furthermore, our position is currently the operating policy of the State College system. Our view, then is the view of the entire academic community.

It is the faculty's wish that the college share with the community an understanding of academic freedom and how it functions. Academic freedom is simply unhampered intellectual inquiry and expression.

We need academic freedom not in order to act and to think capriciously and licentiously, but to bring to the larger community the benefits which only understanding can yield. We count ourselves citizens of a democracy seeking to establish in the world at large conditions not only for our own survival but for the survival and prosperity of peoples everywhere. To survive and prosper in a world such as ours, however, requires full freedom to pursue the truth wherever it may lead. Perhaps the best guarantee we have as a nation that we shall not succumb to the powers of darkness, ignorance, tyranny and oppression which abound in the world today is the freedom of our scholars, scientists and students to probe, inquire, and examine. This is the essence of academic freedom. Without it there can be no truly educational institutions. And without educational institutions our society can all too quickly sink back into the dark ages from which mankind has slowly climbed only after the passage of centuries. It is scarcely nec-

essary to dwell on the more tangible, material benefits which freedom of intellectual inquiry has yielded to our society.

However, freedom of intellectual inquiry is a two-edged sword. With its benefits also come necessary burdens for contemporary society and additional responsibilities for scholars. The knowledge which advances society is often distasteful or offensive to some. It may breed conflict. Moreover, intellectual inquiry sometimes fails to accomplish its desired goals.

The capricious and licentious use of academic freedom although rare sometimes occurs, and the academic community has provided itself with safeguards against initial and repeated occurrence. These constitute, in essence, a code of ethics comparable to those employed in the medical and legal professions. Again, the criteria and procedures are best described in the AAUP handbook on Academic Freedom and Tenure. Briefly, provision is made for judgment of the scholar by his professional peers. In essence, the safest check one has against error and irresponsibility is the intellectual freedom to scrutinize and challenge it. Students, no less than teachers, stand to realize the most from their education if they are permitted to witness the triumph of reason and truth over error.

Therefore, in consideration of our obligation to society, we, the faculty of California State College at Fullerton, reaffirm our determination to encourage the free pursuit of learning, and to seek and state the truth as we see it concerning ideas, art forms, issues and controversies within the framework of law. The responsibility to assure, insofar as possible, peaceful demonstrations and assemblies when ideas clash and contend is also recognized. As responsible scholars, we pledge our energies to the enrichment of society. As a fulfillment of our pledge, academic freedom is the single most important condition we require of society—if that pledge be fulfilled.

The quality of any college or university in the final analysis is dependent upon the quality of its faculty. The faculty of California State College at Fullerton is among the best prepared professional groups in the Nation. More than sixty per cent have completed the highest training possible by attaining the doctoral degree in their respective disciplines. The scholarly productivity of the group in terms of reviewing, evaluating, and adding to existing knowledge is high. Activities at CSCF in the considered judgment of the professional faculty characteristically have been of value in seeking the truth. Indeed the search for truth is inherent in the exercise of professional responsibility. Since faculty activities may be questioned from time to time, it is appropriate to restate the college position and review the existing machinery for implementing standards of professional activity.

- (1) The Faculty Council sharing the President's position of full confidence in the intellectual and professional integrity of the Faculty urges the Faculty to continue to develop activities and programs that will bring credit to the College and further requests them to continue to refrain voluntarily, within the limits of conscience and the proper discharge of their academic responsibilities, from any actions that might bring discredit to the College.
- (2) Should an *unusual* situation arise in which a member of the Faculty considers that the proper discharge of his professional re-

sponsibilities appears to require that he engage in, promote or condone actions likely to arouse public disfavor, he is urged but not required to request the advice of an appropriate existing body, e.g. a departmental faculty, and/or the Faculty Council. Recommendations from any of the foregoing bodies shall be forwarded to the President who may wish also to seek the advice of a lay committee recommended by the College Advisory Board.

- (3) The student body as an integral part of the academic community and sharing its freedoms and responsibilities should also continue to be alert to activities and programs that will bring credit to the College.

6. STATEMENT OF THE ADVISORY BOARD OF THE CALIFORNIA STATE COLLEGE AT FULLERTON, PRESENTED BY LELAND C. LAUNER, ESQ., CHAIRMAN

Mr. Chairman, Honorable Senators and Gentlemen:

My name is Leland C. Launer. I am before you today as Chairman of and representing the Advisory Board, California State College at Fullerton. By resolution of the College Advisory Board at its meeting of January 15, 1968 I am privileged to submit the following.

As you know, Education Code Section 23651 requires that the Board of Trustees of the California State Colleges establish and appoint for each State College, an Advisory Board of at least seven members. The Code provides two absolute qualifications for membership on an Advisory Board:

- (1) A member can not hold *any* salaried educational position, and
- (2) A member *must* reside in the area in which the college is located.

Each Advisory Board has two officers: the Chairman selected by his fellow members, and an Executive Secretary, who is automatically the President of the local state college and who is nonvoting. Education Code Section 23657 requires the Executive Secretary to immediately report all activities of the Board and all recommendations of the Board to the Board of Trustees.

I believe it of crucial importance that the composition and structure of the Advisory Board be kept in mind during your considerations and deliberations pertaining to your present investigation. The Advisory Board is a body created by the Legislature; it was not created by the educational system nor is its membership composed of educators. The Advisory Board is appointed by the State Board of Trustees and serves as an arm of the State Board of Trustees, reporting its deliberations and recommendations to the Trustees. The Advisory Board is local, its membership being comprised of local citizens concerned with development of the local state college within the context of the local community it serves. The Advisory Board of our State College is the *one* institution of local impact, created by you gentlemen of the Legislature, in the State College System.

The duties of State College Advisory Boards are broad. Briefly stated in terms of Education Code Section 23655, each Board is to

consult with and advise the President of the college with respect to the improvement and development of the college.

Since its inception almost ten years ago, the Advisory Board of the Fullerton campus has deliberated and presented its recommendations on a great number of matters. The fact that its members are all active within this area results in the Board's being particularly concerned with the relationship of the State College and the local community. The Advisory Board has been, and continues to be, vitally concerned with the healthy development of the College and the community, and with the maintenance of the valuable relationship between the two.

Since the recent performance of the play, "The Beard," on our State College campus became a matter of community concern which would affect the growth and development of the College, the Advisory Board felt it appropriate to study the matter and advise the President. "The Beard" was performed on California State College at Fullerton campus on November 8 and 9, 1967; shortly thereafter articles appearing in the local press came to our attention, whereupon the Advisory Board undertook a thorough review of all available facts surrounding the performances. By its December 4, 1967 meeting, the Board had gathered the significant facts relevant to the performances of the play in question.

I wish to further point out that gathering facts did by no means end the Advisory Board's responsibility in this matter. The Board members were well aware it would resolve nothing if it contemplated such facts in vacuum; the Advisory Board is not a body of drama critics qualified to review college performances nor does it perform the role of the Courts in determining what is pornography and what is not. To report that the performances were clean or dirty would be an idle act, fraught with the danger of failing to discharge our principal responsibility—to assist in the development of both our College *and* our community.

Inherent in the consideration of these matters and the recommendation of the Advisory Board is a firm belief in the principles of Academic Freedom and Responsibility so well expressed through the years by the AAUP. A major function of a college or university is the search for truth which will necessarily lead to the study of controversial ideas sometimes objectionable to some in the community. The right and responsibility of trained professionals to pursue these ideas and to help students evaluate ideas for themselves is essential to the very nature of higher education. We believe that at California State College at Fullerton we are fortunate in having an outstanding faculty and administration. We have full confidence in their professional judgment and in their willingness to accept the responsibilities associated with Academic Freedom.

The Advisory Board contemplated the facts of the performances of this play in light of the needs of both college and community, aware of the problems besetting the public and the campus, and seeking guidelines for resolution. On December 4, 1967 the Advisory Board unanimously adopted a resolution which recommended to the President a possible procedure whereby the College faculty and the Advisory Board could accomplish mutually helpful dialogue when explosive situations developed or were anticipated. Following extended study

by the President, Faculty Council, and Advisory Board a mutually acceptable College Policy was recommended to and accepted by the President.

This procedure, together with the President's statement regarding utilization of a special committee designated by the Chairman of the Advisory Board indicate our common agreement to provide a foundation on which to continue the beneficial development of college and community. The three local citizens whom I have appointed to the committee which will be advisory to President Langsdorf are (1) Dr. Arnold O. Beckman, (2) Mr. Coalson C. Morris, and (3) Mrs. C. L. DePriester.

It is true that the use of the committee has not been tested by time, nor has the cooperative relationship and dialogue with the faculty. However, we believe that our developed program will be of great assistance in the future.

Gentleman, it is a basic precept of California higher education that the local campus serve its geographical area and maintain the support of the people in that area. It is the purpose and duty of the local campus' Advisory Board to advise the President and assist when problems arise. This it has done.

Gentlemen, I assure you every member of the Advisory Board is vitally interested in the healthy development of California State College at Fullerton; it is of direct and immediate concern to all of us who live and reside in this area; its development reflects both the quantity and quality of the progress of our own community. We will continue to assist this development.

It is our belief that the actions taken in this particular incident are examples of a local community and campus meeting their problems and taking steps to resolve them. We do not believe additional legislation on this matter is either warranted or necessary—the framework you gentlemen have already established has and is functioning. We trust you will let it work and support it.

Advisory Board,
California State College at Fullerton
LELAND C. LAUNER, Chairman

7. AFFIDAVITS IN CONNECTION WITH THE PERFORMANCE OF "THE BEARD" AT CALIFORNIA STATE COLLEGE AT FULLERTON

I hereby certify that I was the Stage Manager for the three performances of "The Beard" which were presented on November 8th and 9th in the Arena Theatre at California State College at Fullerton.

In my capacity as Stage Manager, I assisted Miss Marian Stanek in dressing prior to each of the three performances. At each of the three performances, I observed that Miss Stanek was wearing *two pairs* of panties in addition to a brassiere and a floor length dress.

I certify, under penalty of perjury, that the foregoing is correct.

/s/ THERESA VILICICH
January 17, 1968

Executed at Fullerton, California

I hereby state that I was in the audience at the November 8th performance of the play "The Beard" in the Arena Theatre at California State College Fullerton.

In my opinion the actor and actress in the play were decently clothed at all times. Furthermore, I wish to state unequivocally that no act of sexual intercourse, perverted or otherwise, occurred in the performance.

I certify under penalty of perjury that the foregoing is correct. This affidavit signed by the following persons:

Patrick W. McNelly
 Carol Bischof
 Michael K. Burgess
 Georgia Allemann
 Gerald Glenn Slate
 Jane Arthur
 James D. Young
 Michael Dexter
 Joel L. Weiss
 Linda Chase
 Frank Curtis Pope III
 Dr. Alvin J. Keller
 Ollie Nash
 Larry Bischof
 James Terry Wills
 Norman D. Nichols
 Nancy Ann Cranford
 Lois V. Arnold
 Raymond J. Tatar
 Suzanne L. Hofstetter
 Sandra Stiglinski
 Rae Carlson
 Ronald J. Crowley
 John W. Bartley
 Theresa Vilicich
 Caril L. Newbold
 Allen M. Zeltzer
 Edwin Duerr
 Joseph Kawaja
 Marilyn Crowley
 Robert M. Hart
 Patrick W. McNelly
 Jill Rae Lang
 Richard C. Clare
 Michael R. Needham
 Gerald Glenn Slate
 Eileen MacMillan
 Larry Bischof
 Karen Stein

Mary K. Knaus
 Fred Vaugeois
 James P. Fumk
 Don L. Rickner
 Nancy Nolin
 Marshall E. Phillips
 Jane Arthur
 Michael A. Dexter
 Mrs. Richard Watson
 Margie Hayes
 Theresa Vilicich
 Ernest O. Clayton
 Edwin Duerr
 Rob-Roy Fletcher
 Michael K. Burgess
 Mary Ann Brown
 Douglas H. Ischar, Jr.
 Linda B. Wojcik
 Robert M. Hart
 Michael R. Needham
 Dianne S. Smoronk
 James Terry Wills
 Rebecca S. Oleyar
 Jane Paul
 Harry McColgan
 Jane Arthur
 Ken Ashbaugh
 Gwenda Deacon
 Millicent F. McKinnon
 John F. Gabler, Jr.
 Karolee Schindler
 Terry L. Goldwyn
 Theresa Vilicich
 Ernest O. Clayton
 Stan Jenson
 Robert E. Pool
 Patricia Glenn
 Donald Louis Dalescadro

APPENDIX III. SPECIAL STATEMENTS

1. STATEMENT OF DR. GLENN S. DUMKE, CHANCELLOR OF CALIFORNIA STATE COLLEGES

Mr. Chairman and Members of the Committee:

I'm Glenn Dumke, Chancellor of California State Colleges. I appreciate the opportunity to appear here before you and I also appreciate your courtesy in taking me early so that I can go to another obligation.

You understand, of course, that I'm not qualified to discuss the specifics of this situation. I will talk about the general relationship between the academic community to the legislature of the State and the people of the State.

When considering freedom and responsibility in the academic community, because they must go together, one must keep in mind the fact that our State Colleges are instrumentalities of the people of California. The State Colleges in their present system were created by an act of the Legislature—the Donahoe Higher Education Act—It was the Legislature that set the goals of the State Colleges, and the Legislature has a legitimate right to inquire into the operations of the Colleges. I believe it is always appropriate to re-examine the strengths and weaknesses of our system of self-regulation.

To maintain a close and essential relationship between our collegiate institutions and the society from which they spring, a lay board of overseers was created. It is primarily through this devoted and hard-working Board of Trustees that the Colleges remain responsive to the needs of the people, and it is through this Board that we receive direction and guidance in our development of policies, and in our operations.

A second principle related to our understanding of the nature of freedom and responsibility is inherent in the fact that, although our State Colleges are organized for a specialized function of service to our society, they are also, from the moment of their creation, members of a larger society—the academic society. This society of scholars, which is older than any existing legislative or judicial body or any nation, gives every college or university a dual responsibility. *The first, as I have stated, is to serve the specific ends for which society created it; the second to advance the accumulation of knowledge and the search for truth.* There is a certain catholicism to all higher learning, and all members of the academic community have an obligation to carry on critical examinations and scholarly work, as well as to render service to the society which makes their academic life possible.

Students, faculty and other members of the academic world must give due recognition to the fact that education is the transmission of society's values and traditions as well as the continuous redefinition of civilization. As a people we share commonly held standards of ethics and morals and when these are violated, we expect duly

constituted authority to take appropriate corrective action. It is here that public concern and opinion is an indispensable aid in alerting us to our responsibility for transmitting society's standards.

The thought that "anything goes" on a college or university campus is as repugnant to the academician as it is to the man on the street. Our democratic system of government recognizes the principle of duly constituted authority and appropriate recourse to change when authority or laws are not in keeping with the times. However, the attitude and climate of a society and of its organized political forces shape the character of its institutions and in the end determine whether they are to be free or controlled. This fact is one reason why I thought it imperative that I appear before you today.

Dr. Langsdorf, as the founding President of California State College at Fullerton, is a particularly effective educational leader. I have been especially pleased with his encouragement of innovation and his search for significant improvements in the instructional process. The faculty which has been developed here at Fullerton, under his guidance, is outstanding. Many members were drawn to this particular institution because of their desire to emphasize the teaching function rather than the research aspect often associated with larger, and older, universities or colleges. President Langsdorf has been received warmly in this community and has been successful in creating a working relationship with the citizens of this area, through his Advisory Board and his affiliates group, which are models for many other institutions. Many of your community leaders are members of these organizations. California State College at Fullerton has developed, in a few short years, into an institution which has an intellectual character and sense of pride which is the envy of many more mature campuses. It has an integrity of purpose and action which I do not wish to see destroyed—either from within or without.

An important part of my responsibility, as I see it, is to maintain and preserve the conditions conducive to the freedom to learn in our institutions. *Free inquiry, discussions, study and expression are at the very heart of the character of the academic enterprise. In the achievement of our ends we are dependent to a very large extent on the professional competence, ethics and judgment of the individual. I want to emphasize very strongly—this is the solution to the problem that we are discussing today: This competence, ethics and judgement of the individual faculty members.* Our State wide Academic Senate, which represents more than 8,000 faculty members, has adopted a statement on professional ethics. I have attached a copy of this statement to these remarks, and I will have a copy of these remarks for you, and I commend it to you, for I believe it spells out in clear and unmistakable terms the privileges and special responsibilities we place on our professors. I would like to quote several key points contained in this statement.

"The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognizes the special responsibility placed upon him. His primary responsibility to his subject is to seek and to state the truth as he sees it. To this end he devotes his energies to developing and improving his scholarly

competence. He accepts the obligation to exercise critical self-discipline and judgment in using, extending and transmitting knowledge."

"As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual and adheres to his proper role as intellectual guide and counselor."

"As a colleague, the professor has obligations that derive from common membership in the community of scholars. He respects and defends the free inquiry of his associates. In the exchange of criticism and ideas he shows due respect for the opinions of others."

When it comes to the application of these principles to a specific case—such as the study of this play in a college dramatic workshop—I would like to make it clear that I fully share the distaste many of you feel for this particular piece of dramatic so called art. It offends my personal sense of literary taste and my sense of moral values. I could say much more about this. I think it's pretty bad. But condemnation and criticism is one thing, and suppression of the right of a faculty to study a disease, such as this thing represents, is another.

In considering alternate courses of action to the issues this Committee is addressing, I believe we need to ask ourselves some rather hard questions. Foremost among these questions is: "*Would legislation requiring mandatory prior review by some Board or commission of all dramatic works studied or presented at the State Colleges be desirable or practical?*"

Such legislation would probably temporarily prevent recurrence of a Beard-type incident. However, I believe that the cost would be inordinate. The United States Supreme Court, in *Sweezy v. New Hampshire*, has stated the greater cost in this way:

"To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding: otherwise our civilization will stagnate and die."

A second question might be along these lines: "*If you say no legislation should be adopted and that this matter should be left up to the exercise of professional responsibility, what will—or should—happen if that responsibility is not exercised?*"

Should a faculty member engage in unprofessional conduct, he may be censured, demoted, suspended or dismissed. If his conduct constitutes criminal behavior, he may be prosecuted under an applicable section of the Penal Code.

It is apparent, from what I have learned from President Langsdorf, that a mistake occurred in that the professor's objective—that of limiting the audience to drama students who had been prepared for a laboratory examination of a play was not carried out. President

Langsdorf has indicated that he does not believe that the professor's behavior justifies discipline or termination of his career. On the basis of the facts that College has furnished my office, discipline of the faculty members involved would not be supported by our own provisions for due process or by the courts. I am further advised that no criminal charges have been brought against any of the participants in the production.

A third question we might ask ourselves is: *"If the material under study in a classroom or laboratory in an institution supported by public funds is—or might be—offensive to the public, does not the institution have an obligation to be sensitive and responsive to that public?"*

Of course we have a duty and responsibility to be sensitive and responsive to the people of this State. We believe the people of this State want the very best education for their young people that their tax dollars will buy. That is what we in the State College system are seeking to give them. In so doing, we have an obligation to our profession and to the State to prepare students to evaluate the good and the bad and to develop a sense of values and artistic taste which will permit them to make appropriate choices.

I would like to close my presentation to you by reading a short quotation from a statement of principles adopted by the American Association of University Professors in 1956.

"We ask, then, for the maintenance of academic freedom and of civil liberties of scholars, not as a special right, but as a means whereby we may make our appointed contribution to the life of the commonwealth and share equitably, but not more than equitably, in the American heritage. Society has the power to destroy or impair this freedom; but it cannot do so and retain the values of self-criticism and originality fostered by higher education."

What we are discussing here today is the very meaning of professionalism and the freedom of the professional in medicine—in the ministry—in the law and in teaching, is to face up to his professional responsibilities. In order for him to adequately discharge his service he needs a personal sense of responsibility and he needs the help and guidance of his fellow professionals. He also needs the confidence and support of his society, even though an occasional mistake will be made, and we look to you members of the legislature to help us achieve this end.

2. STATEMENT OF GEORGE ST. JOHNS, PRESIDENT OF CALIFORNIA STATE COLLEGE STUDENT PRESIDENTS ASSOCIATION

Mr. Chairman, Members of the Committee,

I have come before you today not to debate the merits of academic freedom, for this is a subject about which I cannot claim to be expert. Rather, I would like to discuss two ideas about which I will claim to be expert; expert because I am a product of both a free demo-

cratic society and because I am a product of one of California's fine state colleges. These ideas are simply the "scientific method" and, more basic, "trust".

First, let me briefly discuss the scientific method. The scientific method, in large part, has been responsible for the tremendous growth, and development of the California State College system and, in deed, of our country. Quite simply, it is a method which requires experimentation, used with empirical guidelines, to generate new theories and, thusly, new knowledge.

The case in point, a play entitled, "The Beard," was conducted at California State College at Fullerton with the scientific method in mind. It was conducted by a group of students whose sole purpose was to determine whether or not such a play could have significant educational value. I suggest to you that the approach used by the students and faculty involved in this production was indeed one that we should be grateful for in terms of the many things that it has given us in the past. Above all else, it is certainly an approach that we should not criticize if we, as an educational system, or in the greater picture, as a country, are to continue to grow and to prosper. The play was carefully staged, and carefully produced. There was no public sale of tickets, and the persons invited to participate were asked to do so in order that they might critique the production and help to determine whether it had value. I think the record now indicates that the majority of those invited to participate in this experiment, i.e. "The Beard," have formulated a negative opinion as to the play's having educational value. This conclusion, however, does not, nor should it, in any way defeat or tarnish the value of the experiment or of the method used.

The second idea that I would like to discuss with you is that of basic trust. Trust is probably the most basic ingredient in maintaining a free, democratic society. The Legislature of the State of California, in its wisdom, created a Board of Trustees and a statewide Chancellor. Further, in designing the various roles to be taken by individual institutions of higher learning, the Legislature provided for administrative personnel and academic personnel, through whose interactions these institutions fulfill the needs of the State of California. By this basic design, the Legislature invoked the principle of trust. Today, I appear before you in a situation which negates your original intention.

I come before you to testify about an incident in which you, of your own accord, have bypassed all those persons you designated to deal with such problems. I submit to you that a large amount of money is budgeted each year to support a capable and certainly a noteworthy Board of Trustees, a Chancellor, whose educational background and expertise ranks among the finest in our country, a college president carefully selected to guide the future of this institution, and faculty members hired to assist him in this great undertaking. All of this personnel has been ignored for a purpose, and to determine some sort of result, that, at this point in time, escapes me.

The resolution which you will find attached to this statement, reads in its 6th Whereas clause, "it appears to be illogical and improper for the Senate of the State of California to request that disciplinary ac-

tion be taken against participants in this play at the same time that it demonstrates its lack of familiarity of the facts by calling for a study." In the 8th Whereas clause of the same document, and I quote, "the C.S.C.S.P.A. urges the Senate of the State of California to return this matter to those areas charged with the responsibility of the California State Colleges, the Chancellor and the Board of Trustees and the individual colleges themselves." These considerations, if taken to heart, would compliment rather than negate your original intent—that of trust.

Three senators voiced opposition toward Senate Resolutions #50 and 51 (Second Extraordinary Session 1967). Those senators are to be commended for:

- A. Their faith in the scientific method as it assists us to build a greater educational system, a greater state and a greater nation, and;
- B. For their trust in the free democratic society; their trust in the personnel employed by them to guide the educational destiny of this and other state colleges.

For those senators who did not oppose these resolutions, I humbly suggest that they consider the following quotation:

"Spare the spurs, boy, and hold the reigns more firmly."

Ovid, *Metamorphoses*

Thank you for allowing me to appear before you today.

GEORGE ST. JOHNS, President
California State College
Student Presidents Association
January 19, 1968

"Beard Resolution"

WHEREAS: The C.S.C.S.P.A. has examined the circumstances surrounding the presentation of "The Beard" by the Drama Department of the California State College at Fullerton, and

WHEREAS: This examination reveals that the presentation of this play was not unlawful, was in accordance with the instruction goals of the drama class that presented it, and was consistent with the College's overall goal of education excellence, and

WHEREAS: The examination further reveals that the behavior of the faculty and students of California State College at Fullerton before, during, and subsequent to this event has been proper and in the best tradition of academic freedom and responsibility, and

WHEREAS: The examination also indicates that the faculty and students of the Drama Department of the California State College at Fullerton did take all reasonable precautions to ensure that an instructor's freedom, and indeed obligation, to explore controversial subjects in a proper classroom environment was properly exercised, and

WHEREAS: The Senate of the State of California has established a committee, "For the study of the subject of legislation neces-

sary to prevent the recurrence of such an incident" which would bypass the appropriate channels of academic review including those implicit in the statutory authority granted to the Board of Trustees for the governance of the colleges, and

WHEREAS: It appears to be illogical and improper for the Senate of the State of California to request that disciplinary action be taken against participants in this play at the same time it demonstrates its lack of familiarity of the facts by calling for a study, and

WHEREAS: This legislative study is clearly contrary to the well-established principle that society's educational goals can be achieved only if the educational process is free from political interference, now therefore be it

RESOLVED: That the C.S.C.S.P.A. urges the Senate of the State of California to return this matter to those areas charged with the governance of the California State Colleges: The Chancellor and the Board of Trustees of the California State Colleges and the individual colleges themselves; be it further

RESOLVED: That the C.S.C.S.P.A.

1. Strongly commends the Associated Student Senate of CSC at Fullerton for its action to date regarding this incident and endorses the spirit of that Senate's resolution of December 1, 1967.
2. Strongly commends President William B. Langsdorf of the California State College at Fullerton for his steadfast refusals to accede to those improper and obviously irresponsible demands by the press, legislators, and others that at least two members of the College Drama Department be summarily discharged.
3. Fully supports the faculty of the California State College at Fullerton in its efforts to protect academic freedom on that campus and for its public defense of the right and obligation of faculty and students to study in a proper classroom environment whatever ideas, concepts, or subjects seem in their view appropriate to the pursuit of knowledge and an understanding of our society, regardless of the degree of controversy; and be it further

RESOLVED: That the C.S.C.S.P.A. provide the Faculty and Administration and students of the California State College at Fullerton with such assistance in responding to this crisis as may be necessary and within the existing limitation of the C.S.C.S.P.A. and the individual student associations.

ADOPTED: January 7, 1968

Action Mandate: "Beard" Resolution

RESOLVED: That the individual student presidents express their support of the Associated Students at California State College at Fullerton in written commendation before January 19, 1968; and be it further

RESOLVED: That the Student Presidents individually express their concern of this matter to the legislatures either in written or oral form; and be it further

RESOLVED: That the C.S.C.S.P.A. send a representative to the Senate Investigation to be held on January 19 for the purpose of presenting this resolution and the views of this body regarding the "Beard" and be it further

RESOLVED: That the Student Presidents support in written form the California State College at Fullerton Student Senate's policy statement regarding the "Beard"; and be it further

RESOLVED: That C.S.C.S.P.A. commend the Academic Senate of the California State College at Fullerton and President Langsdorf for their stand on the "Beard."

ADOPTED: January 7, 1968

o

An Analysis and Evaluation of Proposals Relating to the Ad Valorem Taxation of Business Inventories in California

A Staff Report to
The California Senate Committee
on Revenue and Taxation

MEMBERS OF THE COMMITTEE

WALTER W. STIERN, *Chairman*

GEORGE R. MOSCONE, *Vice Chairman*

CLARK L. BRADLEY
RANDOLPH COLLIER
WILLIAM E. COOMBS
LOU CUSANOVICH
GEORGE DEUKMEJIAN

DONALD L. GRUNSKY
GEORGE MILLER, JR.
JAMES R. MILLS
NICHOLAS C. PETRIS
JACK SCHRADER
STEPHEN P. TEALE

WILLIS L. CULVER, *Consultant*

March, 1968



Published by the
SENATE
OF THE STATE OF CALIFORNIA

ROBERT H. FINCH
President of the Senate

HUGH M. BURNS
President pro Tempore

JOSEPH A. BEEK
Secretary

LETTER OF TRANSMITTAL

March 11, 1968

*Honorable Robert H. Finch, President
and Members of the Senate*

Gentlemen :

We are pleased to transmit to the Senate a report on the subject of the taxation of business inventories in California.

Respectfully submitted,

WALTER W. STIERN, *Chairman*
Senate Committee on Revenue
and Taxation

GEORGE R. MOSCONE, *Vice Chairman*
CLARK L. BRADLEY
RANDOLPH COLLIER
WILLIAM E. COOMBS
GEORGE DEUKMEJIAN
LOU CUSANOVICH

DONALD L. GRUNSKY
GEORGE MILLER, JR.
JAMES R. MILLS
NICHOLAS C. PETRIS
JACK SCHRADE
STEPHEN P. TEALE

TABLE OF CONTENTS

Section	Page
I Introduction	7
II Definition of the Taxation of Inventories.....	8
III The Assessment of Inventories.....	9
IV Arguments Relating to Inequities in Inventory Taxation....	10
V Economic Factors Relating to Inventory Taxation.....	12
VI Special Industry Problems.....	16
VII Problems Arising if Inventories Are Exempted From Taxation	17
VIII Assessing Inventories at Their Average Level.....	19
IX Evaluation of the Proposal to Exempt Inventories From Property Taxation	21
X Evaluation of the Proposal to Assess Inventories at Their Average Level	23
XI Evaluation of Enacting a Freeport Law in California.....	24
XII Evaluation of Optional Averaging.....	25
Notes	26
Appendix A: The Taxation of Inventories in Fifty States....	27
Appendix B: Draft of a Resolution to Carry Out the Recom- mendations of the Report	33
Appendix C: Opinion of Legislative Counsel	37
Appendix D: Legislative Analyst: Wholesaling and Public Warehousing in California and Neighboring States	41

I. INTRODUCTION

Section 152 of Chapter 963 of the Statutes of 1967 (SB 556: Deukmejian) provides that, beginning July 1, 1968, one-fourteenth of the bank and corporation tax (approximately \$39 million) will be available to replace revenue lost to local government by reason of the repeal or reduction of the property tax on (1) business inventories and (2) household furnishings and personal effects.

To develop a body of information concerning the proposed exemption of business inventories, the Senate Committee on Revenue and Taxation, constituted as a subcommittee of the Senate Committee on General Research, held hearings on October 23 and 24, 1967, in Los Angeles and on November 27 and 28, 1967, in Sacramento.

This report analyzes and evaluates various proposals made to the committee during the course of the hearings. The report makes the following recommendations:

1. *The Legislature should provide for an independent advisory group to determine whether the economic advantages of exempting inventories outweigh the economic and fiscal disadvantages; if the group recommends in favor of the exemption, it should recommend a replacement revenue program which minimizes the replacement program's economic and fiscal disadvantages.*

2. *The Legislature should provide for a study to evaluate the economic advantages of enacting a freeport law as an alternative to exempting inventories.*

Appendix B, page 33, contains a draft of a resolution to carry out these recommendations.

To complement the Revenue and Taxation Committee's study of the policy aspects of the exemption question, the Senate Committee on Rules contracted with the State Board of Equalization to conduct a study to determine the revenue loss that can be expected from an exemption of inventories. That study will be published separately.

II. DEFINITION OF THE TAXATION OF INVENTORIES

For ad valorem tax purposes, property is divided into two categories, as follows:

1. Real property, which consists of land and improvements to land such as houses and buildings.

2. Tangible personal property, which consists of moveable objects.* Tangible personal property, for tax purposes, may be divided into three categories, as follows:

a. Household goods and personal effects.

b. Machinery, equipment, business fixtures, and livestock and farm goods not held for sale.

c. Inventories.

Inventories consist of goods held for sale or for rent and include raw materials, goods being processed, and finished products.

It is imprecise to speak of repealing the inventory tax, for there is no special tax on inventories in California. Inventories are part of the property tax base; the general property tax applies to inventories just as it applies to real property, machinery, equipment, etc.

The question confronting the Legislature is whether inventories should be excluded from the property tax base.

* Intangible personal property—which consists of debts, contracts, corporate stock, bonds, and the like—is not taxed in California.

III. THE ASSESSMENT OF INVENTORIES

The enactment of Chapter 147 of the Statutes of 1966 (AB 80) will alleviate abuses which have existed in the assessment of inventories in California. Before the passage of AB 80, some assessors applied a higher assessment ratio to inventories than to other types of property. AB 80 requires an announced, countywide assessment ratio to be applied to all taxable property. Beginning in 1971, all taxable property, including inventories, will be subject to a 25-percent assessment ratio.

No witness emphasized assessment abuses as a reason for exempting inventories from taxation. Mr. Ronald B. Welch, Assistant Executive Secretary, Property Taxes, State Board of Equalization, testified as follows:

If inventories remain taxable, I believe that the ratio between actual assessed values and true values will be more uniform for this type of property than for any other major property type on the tax rolls. The reasons for this are that: (1) inventory costs are generally accurately reflected in accounting records and can therefore be accurately reported and readily audited; (2) inventory cost is an excellent value indicator because it is usually a recently incurred cost and this cost is a recent sale price; (3) the prescription of uniform property statements and adoption of inventory valuation rules by the State Board of Equalization, as required by A.B. 80, will make accurate reporting and assessing of inventories much more prevalent in 1968 than they have ever been before; and (4) the mandatory auditing provisions of A.B. 80 and the auditing assistance that the State Board is now giving assessors will make deliberate misreporting of inventories much more hazardous in the future than it has been in the past.¹

IV. ARGUMENTS RELATING TO INEQUITIES IN INVENTORY TAXATION

Allegations of inequities resulting from including inventories in the tax base arise from the physical and economic nature of inventories.

Physically, inventories are moveable. During the process of changing raw materials into finished goods, inventories can change identity, shape, weight, color, texture, and size. Inventories are transferred from one owner to another; they can be transferred with ease from one jurisdiction to another.

Economically, inventories are current rather than fixed assets. Businessmen attempt to sell goods to replenish their stocks; they seek to speed raw materials through the process of production and into the market. For strategic reasons, or because of necessity, businessmen may sometimes increase their stock of inventory and at other times may decrease their stock of inventory.

By contrast, fixed assets consist of such things as land, buildings, equipment, and furniture used in producing, storing, accounting for, and selling goods and services. Fixed assets do not move from one governmental jurisdiction to another as often as inventories; they move from one owner to another less frequently than inventories; and when they are sold they are not purchased and held for the purpose of resale.

ALLEGED INEQUITIES

1. Inventories and other business personal property are appraised annually while real property is appraised less frequently. Thus the effective tax rate on inventories may be slightly higher than the effective tax rate on other property on the same roll.

2. Businessmen engaged in goods-producing or selling operations are required to maintain inventories and to pay a tax on this type of property. By contrast, businessmen engaged in service operations generally do not pay such a tax. For example, manufacturers, wholesalers, and retailers are taxed; doctors, lawyers, accountants, and businesses primarily engaged in rendering services pay a small amount of tax or no tax at all.

3. On the lien date, some businesses require high levels of inventory; others may require more modest levels. Building material dealers, canners, nurserymen, and winemakers, for example, must have high levels of inventories on the lien date. Retailers of toys, by contrast, may have considerably less inventory in March than in November. Some businesses can, for tax reduction purposes, deplete their inventory stocks while others cannot.

4. Inventory taxes must be paid whether or not a business makes a profit. Indeed, a business may have higher inventories, and higher taxes, during an unprofitable period than during a profitable period.

5. The tax resulting from the inclusion of inventories in the tax base is loosely related to gross sales.

For example, a jewelry store may have gross sales of \$100,000 and may turn its inventory over once during the year. The assessed value

of the average inventory (or the inventory on the lien date) of the jewelry store is \$12,500 (one-quarter of the \$50,000 wholesale price of the goods). A \$10 tax rate results in a tax of \$1,250.

An appliance store, on the other hand, may also have gross sales of \$100,000 and may turn its inventory over five times during the year. The assessed value of the average inventory (or the inventory on the lien date) of the appliance store is \$3,500. (The \$70,000 wholesale price divided by 5 is \$14,000. One-quarter of \$14,000 is \$3,500.) A \$10 tax rate results in a tax of \$350.

Both stores had gross sales of \$100,000 during the year; the jewelry store's tax is \$1,250; the appliance store's tax is \$350.

ARGUMENTS DIMINISHING THE FORCE OF THE ALLEGED INEQUITIES

1. All but the first of the above alleged inequities apply with as much force to the taxation of real property as to the taxation of inventories. Real property taxes must be paid whether or not a business makes a profit; real property taxes are unrelated to gross sales; some businesses must own more real property than other businesses; some businesses have to own real property of greater value than real property owned by other businesses; some businesses don't have to own any real property.

What is the force of the argument that the inventory tax is unrelated to gross sales? People who deal in slow-turnover merchandise must have a greater profit margin than people who deal in quick-turnover merchandise; otherwise, people who deal in slow-turnover merchandise would liquidate and invest in quick-turnover merchandise.

2. The argument that professional and service businesses receive favorable tax treatment because they require no inventories ignores significant differences between such businesses and businesses that require inventories. Persons engaged in professional and service businesses may have to buy licenses and pay fees for the right to engage in the business; persons engaged in such businesses may have to meet stringent educational requirements; and persons engaged in such businesses are engaged in the sale of time, not in the sale of goods. With as much logic, it can be alleged that the sales tax is inequitable because it applies to goods but does not apply to services.

3. Looking at any one part of the entire tax system in isolation will reveal inequities that are not so serious when considered in light of the whole system and in light of the consequences of attempting to remove the inequities.

V. ECONOMIC FACTORS RELATING TO INVENTORY TAXATION

Proponents of the proposal to exempt inventories from taxation make the following economic arguments in favor of the exemption:

1. The inclusion of inventories in the tax base discourages manufacturers and certain wholesalers from locating or expanding in California.

2. California manufacturers and producers lose business because they cannot compete with manufacturers and producers in states that do not tax inventories.

3. California wholesalers lose business because goods are stored outside California in states that exempt inventories or have freeport laws. New warehouse space is built in such states instead of in California.

4. Manufacturers, wholesalers, and retailers deplete their stocks before the lien date, causing economic loss to themselves and to their employees, suppliers, and customers.

5. Exempting inventories from taxation will decrease the price of goods.

6. Exempting inventories from taxation will encourage manufacturers to locate new facilities in California, increase California manufacturers' sales, increase tax revenue, increase the assessed value of property, decrease unemployment, and decrease government expenditures caused by unemployment.

Most of the economic arguments for exempting inventories are based on the contention that other states give special tax treatment to inventories or are moving in the direction of giving such treatment. If California becomes one of the few states that does not give special tax treatment to inventories, it is argued, the adverse economic consequences will become increasingly severe and the benefits to be gained from an exemption will be increased.

Appendix A, page 27, summarizes the provisions of the law regarding the taxation of inventories in 50 states.

ARGUMENTS AND FINDINGS THAT TAXES DO NOT AFFECT PLANT LOCATION DECISIONS

Several witnesses at the hearings disputed the claim that inventory taxes have a major effect on decisions regarding manufacturing plant location. They referred to studies² which show that managers, in deciding on the location of new manufacturing facilities, give greater weight to the following nontax factors:

1. Availability and cost of labor and raw materials.
2. Proximity to customers.
3. Government expenditures for roads, water, sewers, schools, and police protection.
4. Proximity to suppliers and subcontractors.
5. Transportation facilities.
6. Availability and cost of power.
7. Proximity to a former location or to the company's main plant.

Witnesses contended, moreover, that the quality and quantity of local government services are, within reason, more important to managers than the level of local taxation.

The above views were supported by Dr. George Break, Professor of Economics, University of California, Berkeley, who testified:

. . . All of the studies that have been made, that I have seen, indicate that taxes rate quite low among the factors that business considers when it is either moving into a state or expanding or building a new plant somewhere.³

ARGUMENTS AND FINDINGS THAT TAXES DO AFFECT PLANT LOCATION DECISIONS

The above views, however, are not conclusive of the question of the effect of inventory taxes on decisions about the location of new manufacturing plants. The following arguments and findings indicate that inventory taxes may affect plant location decisions:

1. The surveys mentioned above may apply only to large new plants; some industries and some managers are more influenced by tax factors than others.

2. A report of the Committee on Intergovernmental Fiscal Relations of the National Tax Association concluded as follows:

In general, property taxation has apparently been a minor factor in industrial development and plant location. It may exert more influence on intrastate competition for industry in some instances than it does on interstate competition. Particularly significant in interstate competition is the influence of tangible personal property taxation, and especially the taxation of inventories.⁴

3. Dr. Harold M. Somers' study of business inventory taxation, published by the Assembly Interim Committee on Revenue and Taxation in 1964, makes the following comment:

How much . . . business and industry leaves the state—or is discouraged from ever entering it [because of inventory taxation]—we cannot say. It takes little insight, however, to imagine that a tax that penalizes those who cannot transfer their inventory out of state over assessment day, and penalizes those businesses that fail to sell and accordingly fail to make money, must act as a damper on plans to locate in the state. This is not inconsistent with the well-established view that enlightened business looks at what services it gets for its state and local taxes before deciding where to locate. We are dealing with a particular, peculiar tax whose "incentive" power is out of proportion to its magnitude.⁵

4. A report of the Advisory Commission on Intergovernmental Fiscal Relations contains the following findings and recommendations:

a. The Commission is aware that retention or repeal of the tax on business personal property is a policy issue the State alone can resolve in full awareness of its own local circumstances. However, the Commission believes that in framing their business tax policies, States should give a high priority to eliminating or perfecting the locally administered tax on business personal property because it discriminates erratically among business firms. Therefore, the Commission recommends that States eliminate the tax on business inventories and either move the administration of the tax on other classes of business personalty (notably machinery and equipment) to the State level or provide strong State supervision over the

administration of the tax to insure uniformity. It recommends further that States reimburse local governments for the attendant loss in revenue by making more intensive use of State imposed business taxes.⁶

b. De-emphasizing the personal property tax, especially on business inventories, is perhaps the most significant step States can take to improve both their business tax climate and their business tax structure.⁷

c. State and local taxes constitute an element of business cost; while not a large cost element (ranging from one to five percent of operating costs for different types of manufacturing) it is a valid cost which must be considered in making managerial decisions.⁸

d. For many firms the particular State and/or local levy which appears to have the greatest influence on managerial decisions is the general property tax. In jurisdictions where this tax is levied upon business inventories it is possible to discern a clear interrelationship between the property tax costs and decisions made by management. The interrelationship exists for large national concerns operating in several States where the tax treatment accorded such inventories differs sharply.⁹

STOCK DEPLETION

Proponents of exempting inventories allege, as one of the adverse economic consequences of including inventories in the tax base, that a general business slowdown occurs during the weeks preceding the March lien date. The proponents charge that "shipments of goods into the State are delayed; some manufacturing . . . is halted, and wholesale and retail stocks are allowed to run down. . . . Some sales are lost because stocks are exhausted; some wages are lost because of underemployment or unemployment; demurrage charges are incurred at out-of-state storage points; additional transportation costs are incurred." ¹⁰

Stock depletion may take the form of delaying the receipt of goods or of selling goods before the March lien date.

As a legal matter, however, it is not possible to avoid the inventory tax by shipping goods temporarily out of state over the lien date. The California courts have ruled that such property remains taxable at its permanent situs.¹¹ There are, moreover, administrative safeguards against taxpayers using this practice for tax avoidance purposes. Mr. Philip E. Watson, the Los Angeles County Assessor, testified that an audit would disclose such practices and that the taxpayer would be subject to the tax.¹²

Certain kinds of inventories are more subject to stock depletion than others. For stock depletion purposes, the ideal goods are high in value relative to size and weight; they are compact, easily transportable, and readily replaceable. At the committee's Los Angeles hearing, witnesses testified that heating and air-conditioning dealers, lighting-fixture dealers, paint and wallpaper dealers, and swimming pool contractors deplete their stocks extensively before the March lien date.

Several factors work against stock depletion as a useful device for reducing business costs. "Businessmen cannot afford to spend much to save a tax of only 2 percent or thereabout on the cost of replacing inventories, and the lengths to which people go to escape this tax may be exaggerated." ¹³ Businessmen, moreover, must take into account customer displeasure and loss of sales caused by goods not being in stock.

WAREHOUSING

Proponents of exempting inventories made three allegations regarding loss of warehousing business in California.

1. During January, February and March each year, there is a decline in the amount of goods stored in California warehouses. Mr. Jack L. Dawson, Secretary-Manager, California Warehouseman's Association, testified that his surveys have "revealed a 25-percent reduction in business during the period December, January and February over the average for the other nine months. This same percentage is also reflected in warehouse labor employed during these three months."¹⁴

This allegation is not, however, confirmed by the findings of Dr. Harold M. Somers' study of business inventory taxation in California. Dr. Somers examined seasonal fluctuations in unemployment in public warehousing in California and concluded: "In short, if the inventory tax has a seasonal effect on warehousing, the effect is submerged in strong seasonal factors which affect business and industry as a whole."¹⁵

2. Cold storage warehouses have been built in many states specifically for the purpose of storing California produce. The existence of freeport laws makes this practice economically desirable; otherwise the produce would be held in California warehouses until required by eastern and midwestern markets.

3. Computer technology and good transportation facilities make it possible to locate warehouses in Nevada and use them for distribution to California markets. As a result, new warehouse space is being constructed in Nevada because of that state's freeport law. Mr. Edward T. Leutheuser, representing the Los Angeles Mayor's Economic Development Board, testified: "There are varying estimates of one-half to one million square feet of warehousing space being created in the Reno and Sparks, Nevada, area."¹⁶

Without denying the fact of new warehouse construction in Nevada, other witnesses denied that the construction results solely from tax factors. Nevada's geographical position with respect to West Coast markets may make a Nevada warehouse a better distribution point than a warehouse in California. The Reno area in particular is a good location for transshipment to Seattle, Portland, San Francisco, Los Angeles, and San Diego.

Appendix D, page 41, compares the wholesaling and public warehousing industry in California and neighboring states.

VI. SPECIAL INDUSTRY PROBLEMS

Two industries—cattle feeders and motion picture and television producers—made special presentations to the committee concerning the effects of inventory taxation.

The statements of these industries are summarized here as illustrations of the arguments and allegations concerning the economic effects of inventory taxation.

Cattle Feeders

Mr. Tom Remington, Manager, Hartman and Williams Company, Calexico, emphasized the competitive disadvantage of livestock feed lots located in California. Mr. Remington testified that cattle-feeding operations are decreasing in California and increasing in Texas, Colorado, Arizona and Nebraska. Admitting that parts of California have natural advantages over other states for cattle-feeding operations—a desert climate allows year-round feeding—Mr. Remington urged reduction of the property tax as a means for California to maintain its competitive position.

Mr. Remington also pointed out that a form of stock depletion in his business lowers cattle prices both before and after the lien date. Before the lien date, the feeder is more willing to sell and the packer is less willing to buy. After the lien date, the packer's stocks are high, having purchased at a low price.

Motion Picture and Television Producers

Legally, motion picture and television negatives are not inventory because they are not held for sale. Negatives are used to make prints, which are sold or leased. However, negatives are taxable personal property and the problems associated with their taxation are similar to the problems associated with the taxation of inventories.

If a producer of motion picture or television films owns a negative located in California on the lien date, the negative is valued by attributing to it all of the production costs of making the negative. These costs include the cost of purchasing the story, writing the script, designing and constructing the set, etc.

That may be a reason for film producers to slow down production in California prior to the lien date or to attempt to finish production and send negatives permanently out of the state before the lien date. The result, according to Mr. John S. Warren, representing the Association of Motion Picture and Television Producers, is to depress this industry during the latter part of December, and during January and February each year.

VII. PROBLEMS ARISING IF INVENTORIES ARE EXEMPTED FROM TAXATION

If inventories are exempted from taxation, three courses of action are possible, each one of which raises difficult problems.

A. The exemption may be enacted without providing replacement revenue to local government agencies.

1. This choice would shift a substantial portion of the cost of local government from inventory taxpayers to homeowners and to farm and service businesses.

2. Many local agencies—those having statutory tax rate ceilings—would have no means of making up the loss in revenue caused by the reduction in assessed value. Equalization funds would make up part of the loss in most school districts, but in many of the districts the increased equalization funds would not be as great as the revenue loss.

3. Many local agencies—those having a bonding capacity limited to a percentage of assessed value—would suffer a decrease in bonding capacity. Tax rates would have to be increased to continue the redemption of outstanding bonds.

B. The Legislature may enact new or increased state taxes to replace the revenue lost by the exemption.

1. The first major problem raised by this choice is what source or sources of revenue to use to obtain replacement revenue. California presently levies almost all of the kinds of taxes usually levied by states, and would probably have to increase one of the existing state taxes to raise sufficient revenue. Another aspect of this problem is the economic impact of new or increased state taxes. Knowledge about that economic impact is essential in judging the economic value of the exemption itself.

2. A second major problem raised by this choice is how to distribute replacement revenue to those jurisdictions which suffer revenue losses. Because the value of inventory varies greatly from one taxing jurisdiction to another, the assumption is wrong that a set percentage of personal or real property is attributable to inventories. A formula which uses such an assumption to distribute revenue will cause a revenue loss to some jurisdictions and a revenue gain to other jurisdictions.

One possible solution to this problem is to use the value of inventories existing in a taxing jurisdiction in a given year as the base for distributing replacement revenue. If that is done, the state should audit the claims of each jurisdiction to ascertain the correct amount of assessed value attributable to inventories. This solution, however, does not solve the problems, mentioned below, concerning growth in inventories and changing jurisdictional boundaries.

Another solution to this problem is to continue assessing inventories (and possibly to continue taxing them at a low rate) and to require the state to make up the revenue losses so measured. Unless a tax of appreciable weight is levied, however, this solution too calls for the

state to audit inventory assessments. Such audits would be more difficult and costly than those referred to in the preceding paragraph.

3. A third major problem raised by this choice is how to measure growth in inventories. If the measurement of replacement revenue is predicated on the value of inventories in a base year and the value is never increased, local jurisdictions will lose the benefit of revenue attributable to increases in the assessed value of inventories.

This problem also touches upon the distribution question, mentioned above. New manufacturers, wholesalers, and retailers will locate in some jurisdictions. Some jurisdictions will change their boundaries to include existing manufacturers, wholesalers, and retailers. Unless the scheme of replacing revenue takes account of such changes, the jurisdiction will be denied permanently the benefit of the additional property.

4. The State Constitution prohibits the Legislature from imposing taxes for local government purposes.¹⁷ For that reason, replacement revenue granted to local taxing jurisdictions will have to be used for state instead of local purposes. This problem can be solved by amending the Constitution to allow state revenue to be used for local purposes.

Even if the constitutional problem is resolved by amendment, a policy problem remains. The temptation will be great to make replacement revenue available to local agencies on state-imposed conditions. If that occurs, local agencies will lose some freedom of choice as to the expenditure of some revenue.

5. Exempting inventories will create pressure on the Legislature to expand the definition of inventories to include as much property as possible. Expanding the definition, in turn, will increase the state's cost of replacing local revenue.

Taxpayers, moreover, will, quite legitimately, attempt to reorganize businesses to take advantage of the exemption.

6. Exemption of inventories will reduce the revenue from the franchise tax paid by banks and financial institutions. A portion of the revenue from the franchise tax paid by banks and financial institutions derives from an in-lieu tax which is measured by the revenue from the tax on the personal property of general (nonutility, nonfinancial) corporations. Exempting inventories will reduce the amount of revenue derived from the tax on the personal property of general corporations and will, consequently, reduce the amount of revenue from the in-lieu tax on banks and financial institutions.

Federal laws prohibit the state from imposing a separate tax on banks and financial institutions to make up for such a reduction.

C. The Legislature may authorize new or increased local taxes to replace the revenue lost by the exemption.

This choice raises each of the problems of using state taxes to replace local revenue losses. In addition, this choice raises policy questions concerning the wisdom of authorizing new or increased local taxes.

Summary—If the Legislature exempts inventories from taxation, it is inevitable that shifts in tax burden will occur and that shifts will occur in the revenue received by local taxing jurisdictions.

VIII. ASSESSING INVENTORIES AT THEIR AVERAGE LEVEL

Several witnesses at the hearings suggested that the problems associated with inventory taxation can be solved if inventories are assessed by averaging their value instead of by valuing them as of one specific day—the lien date. For example, inventories can be valued as of the last day of each quarter and assessed at their average value on the four dates. It is arguable that this method of assessment would inconvenience few businesses, since most businesses take quarterly inventories.

The following are four aspects of the averaging proposal:

1. *Averaging and stock depletion*

As indicated above, the economic costs of stock depletion may be exaggerated, since businessmen cannot afford to spend a great deal to save a tax of about 2 percent of the replacement cost of goods. The enactment of an averaging system would reduce the incentive for stock depletion even further. Quarterly averaging would make the tax on inventory held at the end of each quarter about one-half of 1 percent.

Mr. Ronald B. Welch, Assistant Executive Secretary, Property Taxes, State Board of Equalization, told the committee that, in his opinion, the effect of averaging would be to reduce stock depletion to “utterly insignificant proportions.”¹⁸

Mr. Leslie D. Howe, Governmental Affairs Director, California Retailers Association, on the other hand, testified that averaging would not end stock depletion. He maintains that, if quarterly averaging were enacted, the effect would be to cause stock depletion to occur on four occasions during the year rather than once.¹⁹

2. *The fiscal effects of averaging*

Mr. Welch presented the following testimony regarding the effects of averaging on tax revenues:

No very reliable statistics on the fiscal effects of averaging are available. To the extent that inventories are at a low ebb on the present lien date, either because of natural seasonal factors or because of tax avoidance tactics, averaging will raise the proceeds of the inventory tax. On the other hand, some of the annual growth in inventories in our dynamic state would be sacrificed by shifting from a tax on, say March 1, 1969, inventories to an average of inventories at the end of the 1968 calendar quarters. In an effort to get some feel for these offsetting effects, I have taken the U.S. Commerce Department's estimates of nation-wide inventories of manufacturers, wholesale merchants, and retail merchants at the end of the four calendar quarters of one year and compared them with the estimates for the first of March in the following year. I have made a somewhat crude deduction for automobile inventories, since these are exempt from property tax in California. The averages for the four calendar quarters compare as follows with the next year's March 1 inventories (all dollar amounts in millions):

	<i>Prior year's average</i>	<i>Current year's lien date</i>	<i>Excess of lien date figure over average</i>
1967-----	\$118,562	\$122,870	+ 3.6
1966-----	98,271	109,678	+11.6
1965-----	99,337	96,770	— 2.6
1964-----	95,284	97,452	+ 2.3
1963-----	90,719	92,043	+ 1.5

From these data, I would conclude that, when unreduced by property tax avoidance tactics (if I may assume that the national figures are not), average inventories in the preceding calendar year are usually several percentage points below the level reached on March 1 of the following year. After allowing for some reduction in tax avoidance if we were to use the averaging technique, I would guess that total inventory assessments would be about the same with averaging as they are under the present law or perhaps a little less. I'm quite sure they would not be more.²⁰

3. *Impact of averaging on taxpayers*

Mr. Welch presented the following testimony regarding the impact of averaging on taxpayers:

Some businessmen who are successfully reducing stocks over the single lien date would pay more tax on their inventories than they now do. Others would pay less. The business community as a whole would probably pay about the same amount in most years. Businessmen would probably spend less money trying to avoid the inventory tax and more on record-keeping.²¹

4. *Averaging and tax procedure*

One of the disadvantages of averaging is the complexity it adds to the assessment procedure and the cost attendant to the added complexity.

Mr. Welch presented the following testimony on this point:

The main disadvantage of inventory averaging is the complication that it adds to the taxing process. This is most serious when a taxpayer's normal accounting records do not disclose all the facts needed for computation of the taxable inventory value, so that special counts must be made or special records kept. Some inventories, for example, are exempt—certain imported goods, goods in interstate and foreign commerce, et cetera. Other goods are moved from one branch of a chain store to another or from a warehouse in one taxing district to a store in another district. It is sometimes not easy to pin down the taxability and situs of inventories on a single date, and it is four times as hard to do so on four dates. To reduce one aspect of this problem, our Board has suggested that an average inventory assessment law contain a rebuttable presumption that the percentage of exempt to total inventory on a single date is applicable to all dates entering into the average. We have also suggested that businesses be authorized to approximate their inventories on all but one date of the year by adding cost of goods purchased and deducting cost of goods sold since the last physical inventory—the so-called gross profit method now used to compute inventories on our present offbeat lien date by the vast majority of business taxpayers.²²

IX. EVALUATION OF THE PROPOSAL TO EXEMPT INVENTORIES FROM PROPERTY TAXATION

In summary, the objectives of exempting inventories from taxation are of two kinds: equitable and economic. The equitable objectives are as follows:

1. To eliminate from the property tax base a kind of property that raises revenue from businessmen who sell or manufacture goods but does not raise significant amounts of revenue from professionals and from service businesses.

2. To eliminate a tax that is loosely related to profits.

3. To eliminate a tax that is loosely related to sales.

4. To eliminate a portion of the property tax base that taxes some businesses—those with high seasonal inventories on the lien date—more heavily than others.

5. To eliminate a portion of the tax base that may be taxed at a slightly higher effective rate than other property on the same roll.

If the case for exemption had to stand or fall on the equitable objectives alone, the case would not be compelling. In the above list, the first, second, and third objectives apply equally to the real property portion of the tax base. If the purpose of exempting inventories is to eliminate those inequities from the tax system, the state should move in the direction of reducing or eliminating reliance on the property tax generally. The fourth objective, as will be mentioned below, probably can be achieved by enacting an averaging system of assessment. That leaves only the fifth objective, which, by itself, is a relatively minor inequity.

The economic objectives are as follows:

1. To eliminate a tax that encourages the storage of goods in warehouses outside of California.

2. To eliminate a tax that causes manufacturers, wholesalers, and retailers to engage in stock depletion practices.

3. To eliminate a tax that discourages the location of new manufacturing plants in California.

4. To eliminate a tax that may place California's manufacturers and producers at a competitive disadvantage with some out-of-state manufacturers and producers.

5. To increase manufacturing, employment, consumption, tax revenue, and assessed value in California.

The issues raised by the economic objectives of exempting inventories are not easily resolved. Two of them, however, can be dealt with summarily:

First, the probability that an averaging system would reduce or eliminate stock depletion is so great that, were stock depletion the only problem, the enactment of an averaging system would be called for.

Second, the economic impact of the loss of some warehousing business is so minor, relative to California's total economy and relative to the amount of business so lost, that, were the loss of warehousing the only problem, the exemption of inventories would not be justified. Some form of freeport law might well be devised to minimize this kind of loss. This point is discussed below in Section XI.

The question thus resolves itself to whether inventories should be exempted to obtain the third, fourth, and fifth economic objectives in the above list.

On the basis of existing evidence, two approaches to resolving this question are possible.

First, one can argue that there is sufficient evidence to make the economic case for the exemption. Persons taking this position rely on the following for support: (1) the actions of other states to grant special treatment to inventories, (2) the testimony of businessmen that enacting the exemption will achieve the desired economic consequences, (3) the findings and recommendations of the Advisory Commission on Intergovernmental Relations.²³

Second, one can argue that there is not sufficient evidence to make the economic case for the exemption. Persons taking this position rely on the following for support:

1. No persuasive evidence exists that the taxation of inventories discourages the location of manufacturing facilities in California.

2. The competitive advantages to be achieved by the exemption must be weighed in light of a specific program to obtain replacement revenue for local government. The economic and fiscal consequences of a program to obtain and distribute replacement revenue might be worse than the economic disadvantages of the present inventory tax. Dr. George Break, Professor of Economics, University of California, Berkeley, testified that "the economic effects of the present taxation of inventories are not serious enough to warrant elimination just for that sake."²⁴

3. The recommendation of the Advisory Commission on Intergovernmental Relations does not carry weight in California (1) because it is predicated on poor assessment practices existing in states other than California and (2) because it is not based on an analysis of California's economy and the economic and fiscal effects of a replacement revenue program.

Recommendation

The Legislature should provide for an independent advisory group to determine whether the economic advantages of exempting inventories outweigh the economic and fiscal disadvantages; if the group recommends in favor of the exemption, it should recommend a replacement revenue program which minimizes the replacement program's economic and fiscal disadvantages.

Appendix B, page 33, contains a draft of a resolution to carry out this recommendation.

X. EVALUATION OF THE PROPOSAL TO ASSESS INVENTORIES AT THEIR AVERAGE LEVEL

The following equitable and economic objectives probably could be achieved by assessing inventories at their average level:

1. To reduce the tax advantage of businesses with low seasonal inventories on the lien date and the tax disadvantage of businesses with high seasonal inventories on the lien date.

2. To reduce or eliminate the economic costs of stock depletion.

The chief disadvantage of averaging, discussed in Section VIII of this report, is adding to the complexity and the cost of inventory taxation.

As indicated by Tables 13 and 14 of Appendix A, eight states enacted laws in 1967 providing for the phasing out or reduction of property taxes on inventories and six of them were previously assessing inventories at their average level.

XI. EVALUATION OF ENACTING A FREEPORT LAW IN CALIFORNIA

Freeport laws are of two kinds: (1) laws exempting goods which come into a state from out of state and which are destined for export to another state or to a foreign country; (2) laws exempting goods which are produced or manufactured in a state and which are destined for export to another state or to a foreign country.

The effect of a freeport law is partially to exempt inventories from taxation. The question whether, in California, a freeport law can be devised to achieve some of the economic objectives of exempting inventories has not been explored. In opposition to that idea, witnesses pointed out that, as far as national consumption is concerned, California is a major terminus for goods rather than a state through which goods pass. That point, however, does not foreclose this question. If the state's objective is to improve the competitive position of the warehousing industry in California relative to the warehousing industry in neighboring states, that objective might be accomplished by granting an exemption for six months to (1) goods imported into the state and held in their original packages and (2) goods produced or manufactured in this state which are destined for export to another state or to a foreign country.

Recommendation

The Legislature should provide for a study to evaluate the economic advantages of enacting a freeport law as an alternative to exempting inventories.

XII. EVALUATION OF OPTIONAL AVERAGING

Optional averaging is a proposal to allow the taxpayer the choice of having inventory assessed at an average level or at the lien date level.

Optional averaging accomplishes none of the objectives of exempting inventories from taxation and none of the objectives of requiring inventories to be assessed at their average level.

Optional averaging would complicate the taxing process without accomplishing a solution to any problems.

NOTES

1. California Legislature, Senate, *Hearings of the Senate Committee on General Research, Subcommittee on Revenue and Taxation*, Sacramento, November 27-28, 1967 (Transcript), pp. 147-8.
2. Fortune, *A Fortune Survey on Locating Plants, Warehouses, Laboratories* (this report, copyrighted by Time Incorporated, 1963, was not published in *Fortune* magazine and contains no date or place of publication); Thomas Bergin, "Are Subsidies Worth While?" *Industrial Development* (July 1960), p. 77.
3. California Legislature, Senate, *Hearings of the Senate Committee on General Research, Subcommittee on Revenue and Taxation*, Los Angeles, October 23, 1967 (Transcript), p. 31.
4. Alfred G. Buehler, "Report of Committee on Intergovernmental Fiscal Relations," *Proceedings of the Fifty-eighth Annual Conference on Taxation*, National Tax Association (1965), p. 396.
5. California Legislature, Assembly Interim Committee on Revenue and Taxation, *Taxation of Property in California* ("Assembly Interim Committee Reports," Vol. 4, No. 12; Sacramento: California State Printing Office, December 1964), p. 151.
6. Advisory Commission on Intergovernmental Relations, *State-Local Taxation and Industrial Location* (Washington: Report A-30, 1967), p. 82.
7. *State-Local Taxation and Industrial Location*, p. 83.
8. *State-Local Taxation and Industrial Location*, p. 59.
9. *State-Local Taxation and Industrial Location*, p. 61.
10. Senate, Subcommittee on Revenue and Taxation, *Hearings*, Sacramento, November 27-28, pp. 143-4.
11. *Opinion of the Legislative Counsel of California*, Appendix C, p. 47.
12. Senate, Subcommittee on Revenue and Taxation, *Hearings*, Los Angeles, October 23, pp. 73-4.
13. Senate, Subcommittee on Revenue and Taxation, *Hearings*, Sacramento, November 27-28, p. 144.
14. Senate, Subcommittee on Revenue and Taxation, *Hearings*, Sacramento, November 27-28, p. 106.
15. Assembly, *Taxation of Property in California*, p. 151.
16. Senate, Subcommittee on Revenue and Taxation, *Hearings*, Los Angeles, October 23, p. 172.
17. California, *Constitution*, Art. XI, Sec. 12; Art. 13, Sec. 25.
18. Senate, Subcommittee on Revenue and Taxation, *Hearings*, Sacramento, November 27-28, p. 144.
19. Senate, Subcommittee on Revenue and Taxation, *Hearings*, Los Angeles, October 23, pp. 55-6.
20. Senate, Subcommittee on Revenue and Taxation, *Hearings*, Sacramento, November 27-28, pp. 145-6. The quotation is taken both from Mr. Welch's prepared statement, which does not appear verbatim in the transcript of the hearings, and from the transcript of the hearings.
21. Senate, Subcommittee on Revenue and Taxation, *Hearings*, Sacramento, November 27-28, p. 147.
22. Senate, Subcommittee on Revenue and Taxation, *Hearings*, Sacramento, November 27-28, pp. 144-5.
23. See pages 13-14, above.
24. Senate, Subcommittee on Revenue and Taxation, *Hearings*, Los Angeles, October 23, p. 29.

APPENDIX A
The Taxation of Inventories
in Fifty States

TABLE 1

Summary of State Laws Relating to the Taxation of Inventories *

Alabama (A)	Some agricultural products and manufacturer's inventories are exempt under certain conditions.
Alaska	No exemptions.
Arizona	Inventories and property-stored-in-transit are exempt.
Arkansas (A)	No exemptions.
California	Specified property is exempt.†
Colorado (A)	The assessment ratio of inventories will be reduced from the present 30 percent to 5 percent by 1973. The assessment ratio of property-stored-in-transit is 5 percent.
Connecticut (A)	Property-stored-in-transit is exempt, and the tax on manufacturer's inventories will be phased out by 1975.
Delaware	No personal property tax.
Florida (A)	The assessment ratio of inventories will be reduced from the present 100 percent to 25 percent by 1969.
Georgia	Some agricultural products, under certain conditions, are exempt.
Hawaii	No personal property tax.
Idaho	Property-stored-in-transit and agricultural products, under certain conditions, are exempt. The inventory tax will be phased out by 1971.
Illinois	Property-stored-in-transit is exempt.
Indiana (A)	Property-stored-in-transit is exempt.
Iowa (A)	Property-stored-in-transit and agricultural products, under certain conditions, are exempt.
Kansas (A)	Property-stored-in-transit is exempt.
Kentucky	Some agricultural products, under certain conditions, are exempt. Property-stored-in-transit is taxed at 1.5¢ per \$100 of assessed value while the tax on other property varies according to its classification.
Louisiana (A)	Property-stored-in-transit and agricultural products, under certain conditions, are exempt.
Maine (A)	Property-stored-in-transit is exempt.
Maryland (A)	Manufacturer's inventories may be exempted by any city or county.
Massachusetts	Inventories and property-stored-in-transit are exempt.
Michigan (A)	Property-stored-in-transit is exempt.
Minnesota	The assessment ratio of inventories is 33½ percent while that of other property varies according to its classification. Inventories are exempt, unless the taxpayer elects to have his tools and machinery exempted instead.
Mississippi	Property-stored-in-transit and some agricultural products, under certain conditions, are exempt.
Missouri	Property-stored-in-transit is exempt.
Montana	The assessment ratio of property-stored-in-transit is 7 percent while that of other property varies according to its classification.
Nebraska	Property-stored-in-transit is exempt.
Nevada (A)	Property-stored-in-transit is exempt.

* The parenthetical (A) in this table indicates that the state assesses inventories at their average level.

† California exempts: (1) Stock in trade up to \$1,500 of a blind vendor in a government building and (2) motor vehicles in dealers' inventories. Baled cotton is assessed at one-tenth of 1 percent of full cash value and in lieu of all other property taxes

New Hampshire (A)-----	Property-stored-in-transit is exempt.
New Jersey-----	Inventories and property-stored-in-transit are exempt.
New Mexico (A)-----	Property-stored-in-transit and agricultural products, under certain conditions, are exempt.
New York-----	No personal property tax.
North Carolina-----	Property-stored-in-transit, beginning in 1969, and some agricultural products, under certain conditions, are exempt.
North Dakota (A)-----	Property-stored-in-transit is exempt.
Ohio (A)-----	Property-stored-in-transit is exempt. The assessment ratio of merchants' inventories will be reduced from the present 70 percent to 50 percent by 1971; the assessment ratio for manufacturer's inventories is 50 percent; the assessment ratio of agricultural personal property will be reduced from 43 percent in 1968 to a complete exemption in 1973.
Oklahoma (A)-----	Property-stored-in-transit is exempt.
Oregon (A/Optional)----	Property-stored-in-transit and some agricultural products, under certain conditions, are exempt. The assessment ratio on inventories will be reduced from the present 100 percent to 50 percent by 1970.
Pennsylvania-----	No personal property tax.
Rhode Island-----	Manufacturer's inventories are exempt.
South Carolina-----	Property-stored-in-transit and agricultural products are exempt. The assessment ratio of merchant's inventories will be reduced from the present 14 percent to 10 percent by 1970.
South Dakota-----	Property-stored-in-transit is exempt.
Tennessee (A)-----	Property-stored-in-transit is exempt.
Texas-----	Property-stored-in-transit and some agricultural products are exempt.
Utah (A)-----	Property-stored-in-transit is exempt.
Vermont-----	Specified products are exempt.
Virginia-----	No exemptions.
Washington (A)-----	Property-stored-in-transit and some agricultural products, under certain conditions, are exempt.
West Virginia-----	No exemptions.
Wisconsin-----	Property-stored-in-transit and specified products are exempt. A credit of 60 percent is provided against the general property tax on inventories.
Wyoming (A)-----	Property-stored-in-transit is exempt. The inventory tax will be phased out by 1972.

TABLE 2

Four states do not tax personal property :

Delaware	New York
Hawaii	Pennsylvania

TABLE 3

Four states exempt all inventories :

Arizona
Massachusetts
Minnesota (unless the taxpayer elects to have his tools and machinery exempted instead)
New Jersey

TABLE 4

Three states are phasing out the tax on inventories :

Connecticut—by 1975 (manufacturer's inventories only)
Idaho—by 1971
Wyoming—by 1972

TABLE 5

Five states are reducing the assessment ratio of inventories:

Colorado—from present 30 percent to 5 percent by 1973
 Florida—from present 100 percent to 25 percent by 1969
 Ohio—from present 70 percent to 50 percent by 1971 (merchant's inventories only)
 Oregon—from present 100 percent to 50 percent by 1970
 South Carolina—from present 14 percent to 10 percent by 1970 (merchant's inventories only)

TABLE 6

The following states have no freeport law of any kind. All others have some kind of freeport law.

Alabama	Florida	Vermont
Alaska	Georgia	Virginia
Arkansas	Maryland	West Virginia
California	Rhode Island	

TABLE 7

Three states exempt manufacturer's inventories but not merchant's inventories:

Alabama
 Maryland (may be exempted by any city or county)
 Rhode Island

TABLE 8

Six states exempt all agricultural products:

Idaho	Louisiana	Ohio (by 1973)
Iowa	New Mexico	South Carolina

TABLE 9

Eight states exempt some agricultural products:

Alabama	Mississippi	Texas
Georgia	North Carolina	Washington
Kentucky	Oregon	

TABLE 10

Three states exempt specified business personal property:

California
 Vermont
 Wisconsin

TABLE 11

One state provides a credit for taxes paid on inventories:

Wisconsin—A credit of 60 percent is provided against the general property tax on inventories.

TABLE 12

One state treats inventories as a special class in a property tax classification scheme:

Minnesota—The assessment ratio of inventories is 33½ percent, while that of other property varies according to its classification.

TABLE 13

Four states have no business personal property exemptions of any kind:

Alaska	Virginia
Arkansas	West Virginia

TABLE 14

Eight states enacted laws in 1967 providing for the phasing out or reduction of property taxes on inventories:

Colorado—reduction of the assessment ratio from the present 30 percent to 5 percent by 1973.
 Florida—reduction of the assessment ratio from the present 100 percent to 25 percent by 1969.
 Idaho—phasing out by 1971.
 Maryland—manufacturer's inventories may be exempted by any city or county.
 Minnesota—inventories are exempt unless the taxpayer elects to have his tools and machinery exempted instead.

Ohio—reduction of the assessment ratio from the present 70 percent to 50 percent by 1971 (merchant's inventories only).
 Oregon—reduction of the assessment ratio from the present 100 percent to 50 percent by 1970.
 Wyoming—phasing out by 1972.

TABLE 15

Of the eight states listed in Table 14, six were assessing inventories at their average level:

Colorado	Ohio
Florida	Oregon (optional with taxpayer)
Maryland	Wyoming

TABLE 16

Twenty-three states assess inventories at their average level:

Alabama	North Dakota	Maryland
Arkansas	Ohio	Michigan
Colorado	Oklahoma	Oregon
Connecticut	Indiana	(optional w/taxpayer)
Florida	Iowa	Tennessee
Nevada	Kansas	Utah
New Hampshire	Louisiana	Washington
New Mexico	Maine	Wyoming

APPENDIX B

Draft of a Resolution to Carry Out the Recommendations of the Report

SENATE CONCURRENT RESOLUTION NO. 38

Relative to the study of business taxation
in California by an advisory committee to
the Joint Legislative Budget Committee.

WHEREAS, Section 152 of Chapter 963 of the Statutes of 1967 provides that on and after July 1, 1968, one-fourteenth of the bank and corporation tax revenue shall be transferred to the Property Tax Relief Fund to be used when appropriated by the Legislature to provide replacement revenues to local government to replace revenues lost by reason of the repeal, or reduction, of the property tax on business inventories and household furnishings and personal effects; and

WHEREAS, The exemption of business inventories from taxation raises questions as to the economic objectives to be achieved, the magnitude of the economic gains to be achieved, and the means for compensating the resulting loss of revenue to local government; now, therefore, be it

Resolved by the Senate of the State of California, the Assembly thereof concurring, as follows:

1. The California Business Taxation Advisory Committee is hereby created to advise the Joint Legislative Budget Committee on the subject of business taxation.

2. The advisory committee shall consist of three Senators to be appointed by the Senate Rules Committee and three Assemblymen to be appointed by the Speaker of the Assembly and three persons to be appointed by the Joint Legislative Budget Committee upon nomination by the Governor.

3. The chairman of the advisory committee shall be appointed by the Senate Rules Committee and the vice chairman shall be appointed by the Speaker of the Assembly.

4. All appointments to the advisory committee shall be made by July 1, 1968.

5. The members of the advisory committee shall serve without salary, but shall receive a per diem of twenty-five dollars (\$25) if not otherwise entitled to such compensation, and shall be reimbursed for their expenses.

6. The advisory committee shall hold public hearings and conduct investigations and studies covering at least the following topics:

(a) The taxation of business in California with emphasis upon personal property taxation of business inventories.

(b) The economic gains to be expected from the exemption of business inventories and the exemption of machinery and equipment.

(c) Methods for raising and distributing revenue to local governments to compensate for losses caused by exemptions of business personal property.

(d) The economic and fiscal consequences of replacement revenue programs.

(e) The feasibility of relieving the tax burden on inventories by means other than the enactment of personal property tax exemptions.

The advisory committee shall not be limited to these topics, but shall hear, investigate and study all questions which they consider appropriate to its basic subject.

7. The advisory committee shall have the following powers:

- (a) To meet at such times and places as it may deem proper.
- (b) To cooperate with and to secure the cooperation of county, city and county, and other local agencies in investigating any matter within the scope of its duties.

8. The Joint Legislative Budget Committee shall employ such professional, secretarial and clerical staff, together with special assistants and consultants as may be necessary.

9. The advisory committee shall file a report with the Joint Legislative Budget Committee no later than the 15th day of January 1970.

The report shall contain the following:

(a) The comprehensive report of the advisory committee's findings regarding the topics enumerated in paragraph 6.

(b) Such other information and recommendations as the advisory committee deems desirable.

10. The sum of _____ dollars (\$ _____), or so much thereof as may be necessary, is hereby made available from the Contingent Funds of the Assembly and Senate for the expenses of the advisory committee and its members and for any charges, expenses or claims it may incur under this resolution, to be paid from the Contingent Funds of the Assembly and Senate and disbursed, after certification by the chairman of the advisory committee, upon warrants drawn by the State Controller upon the State Treasurer.

APPENDIX C
Opinion of Legislative Counsel

LEGISLATIVE COUNSEL
OF CALIFORNIA
GEORGE H. MURPHY

Sacramento, California
November 6, 1967

Honorable Walter W. Stiern
Room 201, 930 Truxtun Avenue
Bakersfield, California 93301

PROPERTY TAX—#26229

Dear Senator Stiern:

QUESTION

Can a taxpayer avoid the property tax by sending his property out of the state immediately prior to the lien date and bringing the property back into the state immediately after the lien date:

OPINION AND ANALYSIS

Section 1 of Article XIII of the State Constitution requires that all property in the state be taxed in proportion to its value unless otherwise exempted. This provision is implemented by Section 201 of the Revenue and Taxation Code.*

Section 405 requires the assessor to “. . . assess all taxable *property in his county . . . to the persons owning, claiming, possessing, or controlling it on the lien date.*” (Emphasis added) It is further provided, in Section 2192, that “. . . all tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which taxes are levied.”

From the language of these two sections, it would appear that the property, to be subject to the property tax, must be in the state on the lien date. However, in the case of *Brock & Co. v. Board of Supervisors* (1937), 8 Cal. 2d 286, a corporation in the jewelry business sent half of its stock to Hawaii on February 22, where it was kept on display until March 14, and returned to California on March 22, well after the lien date which fell on March 4. The intention in shipping the jewelry was twofold: (1) to exhibit it for possible sale; and, (2) to reduce the company's personal property tax. The court stated, in allowing the tax to be imposed, that:

“There is no duty to maintain property permanently in a jurisdiction where it will be subject to the taxing power, but it may be removed to a nontaxing jurisdiction and escape the imposition of taxes if such removal be permanent. (Citations omitted). But if the removal is intended to be temporary only, obviously the purpose, if exclusively for tax reduction, fails, for the property remains taxable at its permanent situs.” (p. 291)

* All references are to the Revenue and Taxation Code.

Therefore, the intention of the property owner is controlling and the mere fact that the property is not within the state on the lien date will not protect the property from taxation if the intention of the owner is to remove it only temporarily to avoid the property tax.

Very truly yours,

GEORGE H. MURPHY
Legislative Counsel

/s/ JAMES E. KASSIS

By
JAMES E. KASSIS
Deputy Legislative Counsel

APPENDIX D

Legislative Analyst: Wholesaling and Public Warehousing in California and Neighboring States

JOINT LEGISLATIVE BUDGET COMMITTEE
CALIFORNIA LEGISLATURE

March 6, 1968

Hon. Walter W. Stiern
Senator, 18th District
Room 2086, State Capitol
Sacramento, California

Dear Senator Stiern:

This is in response to your inquiry concerning the importance of the wholesale trade industry in California compared to our neighboring states.

Table 1 shows that 342,600 employees were engaged in the wholesale trade during 1966, and this work force corresponded to 5.6 percent of the total nonagricultural employment in the state. California's proportion of wholesale employees was above the ratio in Arizona and Nevada, but slightly below the Oregon percentage.

TABLE 1
WHOLESALE EMPLOYEES AS PERCENT OF TOTAL
NONAGRICULTURAL EMPLOYMENT—1966

(amounts in thousands)

State	<i>Employees</i>		<i>Wholesale as Percentage of Total</i>
	<i>Wholesale</i>	<i>Total</i>	
California -----	342.6	6,105.0	5.6%
Arizona -----	19.5	431.2	4.5
Nevada -----	4.9	161.1	3.0
Oregon -----	39.0	636.9	6.1

Source: U.S. Department of Labor, Bulletin No. 1370-4, July 1967.

Table 2 shows the growth of both wholesale and retail employment in California and three neighboring states since 1960. This information indicates that wholesale employment grew by 50,400 in California during this period which was lower than the growth rate in retail employment. Nevada had the highest growth rate for both categories, but Table 1 showed that wholesale employees were a very small percentage of total employment. This information also indicates that California has over 84 percent of the wholesale employees in these four states.

TABLE 2
NUMBER OF WHOLESALE AND RETAIL EMPLOYEES IN
SELECTED WESTERN STATES

(in thousands)

Year	<i>California</i>		<i>Arizona</i>		<i>Nevada</i>		<i>Oregon</i>	
	<i>Whole- sale</i>	<i>Retail</i>	<i>Whole- sale</i>	<i>Retail</i>	<i>Whole- sale</i>	<i>Retail</i>	<i>Whole- sale</i>	<i>Retail</i>
1960-----	292.2	775.4	16.0	63.8	3.0	16.4	31.2	82.4
1961-----	296.3	784.3	16.6	65.7	3.3	17.4	30.6	82.2
1962-----	303.3	818.1	17.2	68.5	3.9	19.1	31.2	85.9
1963-----	311.9	857.1	17.6	72.2	4.5	21.9	32.4	89.9
1964-----	320.0	904.5	17.8	74.4	4.6	23.0	34.3	94.3
1965-----	330.5	939.2	18.6	75.9	4.8	24.5	36.7	99.8
1966-----	342.6	980.3	19.5	78.7	4.9	25.6	39.0	104.3
Change 1960-66								
Amount-----	50.4	204.9	3.5	14.9	1.9	9.2	7.8	21.9
Percent-----	17.2%	26.4%	21.9%	23.3%	63.3%	56.1%	25.0%	26.0%

Source: U.S. Department of Labor, Bulletin No. 1370-4, July 1967.

Table 3 shows the distribution of wholesale employees in California. This information shows that almost half of these employees are located in the Los Angeles area, and that wholesale employment in Sacramento is almost twice as high as the Nevada total. (The Reno area had 2,400 wholesale employees, the Las Vegas area had 2,100, and there were 400 in the rest of the state.)

TABLE 3
WHOLESALE EMPLOYEES IN CALIFORNIA, 1966

<i>Location</i>	<i>(in thousands)</i>	<i>Employees</i>
Anaheim-Santa Ana		8.8
Bakersfield		3.8
Fresno		8.5
Los Angeles		170.9
Oxnard-Ventura		3.6
Sacramento		9.7
San Bernardino-Riverside-Ontario		9.2
San Diego		10.4
San Francisco-Oakland		77.2
San Jose		10.3
Santa Barbara		3.2
Santa Rosa		1.8
Stockton		4.2
Vallejo-Napa6
All other		20.4
Total		342.6

Source: U.S. Department of Labor, Bulletin No. 1370-4, July 1967.

The 1963 Census of Business showed that wholesale sales totaled \$35,386 million in California which was 9.9 percent of the national sales. Table 4 shows this information and the sales in three neighboring states. These data also indicate the sales by merchant wholesalers. The total figures include these merchant sales plus those of manufacturers, merchandise agents, brokers, and petroleum bulk stations. This information indicates that California has a higher proportion of nonmerchant wholesale trade volume than our three neighboring states.

TABLE 4
WHOLESALE TRADE SALES—1963

	<i>(in millions)</i>	<i>Merchant Wholesaler Only</i>	<i>Merchants as Percent of Total</i>
<i>Total Sales</i>			
California	\$35,386	\$15,609	44.1%
Arizona	1,791	1,014	56.6
Nevada	390	299	76.7
Oregon	4,448	2,537	57.0

Source: U.S. Department of Commerce, "1963 Census of Business, IV Wholesale Trade Statistics," Table E.

These census data contain information on wholesale employment by type of industry and product for California. However, similar information for Nevada is not available. Therefore interstate comparisons cannot be made.

Table 5, enclosed, contains information on public warehouse facilities in California and the three neighboring states. This information relates only to one portion of the total warehouse industry, but it does give a good breakdown by type of facility and product. For example, the statistics show that over half of the revenue from public warehousing in California was attributable to the storage of household goods.

Sincerely,

A. ALAN POST
Legislative Analyst

TABLE 5

PUBLIC WAREHOUSE FACILITIES IN SELECTED WESTERN STATES—1963

Area and type of warehousing facility	Establishment	Revenue (\$1,000)	Paid employees	Occupiable public storage space, December 31			Frozen food lockers, December 31*	
				Floor-space (1,000 sq. ft.)	Refrigerated space (1,000 cu. ft.)	Bulk liquid storage space (1,000 gals.)	Individual lockers installed	Bulk freezer storage space (cu. ft.)
Arizona								
Household goods warehousing and storage	19	\$4,240	369	486	--	--	--	--
General warehousing and storage	8	390	32	190	--	--	--	--
Refrigerated warehousing, except food lockers	3	467	32	44	408	--	--	--
Food lockers, with or without food preparation facilities†	11	556	36	--	14	--	2,553	13,587
Farm products warehousing and storage	6	3,114	266	2,162	--	--	--	--
Other special warehousing and storage	3	385	20	169	--	--	--	--
Total—Arizona	50	\$9,152	755	3,051	422	--	2,553	13,587
Nevada								
Household goods warehousing and storage	11	\$1,110	84	228	--	--	--	--
General warehousing and storage	7	1,053	98	377	10	--	--	--
Refrigerated warehousing, except food lockers	1	(D)	(D)	(D)	(D)	--	(D)	(D)
Food lockers, with or without food preparation facilities†	2	(D)	(D)	(D)	(D)	--	(D)	(D)
Farm products warehousing and storage	--	--	--	--	--	--	--	--
Other special warehousing and storage	--	--	--	--	--	--	--	--
Total—Nevada	21	\$2,437	186	615	33	--	960	4,911
Oregon								
Household goods warehousing and storage	32	\$3,991	353	621	--	--	--	--
General warehousing and storage	21	5,137	500	1,311	142	--	--	--
Refrigerated warehousing, except food lockers	35	5,141	314	23	25,092	--	3,550	1,900
Food lockers, with or without food preparation facilities†	22	1,030	53	--	137	--	15,348	14,743
Farm products warehousing and storage	10	605	69	88	--	--	--	--
Other special warehousing and storage	4	170	10	126	--	--	--	--
Total—Oregon	124	\$16,083	1,299	2,169	25,371	--	18,898	16,643
California								
Household goods warehousing and storage	427	\$67,208	5,125	8,977	--	--	--	--
General warehousing and storage	90	21,543	1,662	7,824	197	26	--	--
Refrigerated warehousing, except food lockers	90	22,513	1,139	550	54,304	--	--	66
Food lockers, with or without food preparation facilities†	84	4,454	195	99	141	--	36,335	131,659
Farm products warehousing and storage	83	12,888	1,415	3,963	5	--	--	--
Other special warehousing and storage	41	5,237	300	1,508	--	36,619	--	--
Total—California	815	\$133,843	9,836	22,921	54,647	36,645	36,335	131,725

(D) Withheld to avoid disclosure.

* Includes only those frozen food lockers and bulk storage freezer space in locker facilities operated in establishments classified in public warehousing.

† Includes only establishments classified as "food lockers, with or without food preparation facilities (SIC 4223)."

SOURCE: U.S. Department of Commerce, "1963 Census of Business, Volume 4, Wholesale Trade," Sections 10-15.

A Statistical Study of
THE ASSESSMENT AND TAXATION
of
BUSINESS INVENTORIES
IN CALIFORNIA

A Report Prepared by The California State Board of Equalization
for the California Senate Committee on Revenue and Taxation

MEMBERS OF THE COMMITTEE

WALTER W. STIERN, *Chairman*

GEORGE R. MOSCONE, *Vice Chairman*

CLARK L. BRADLEY

RANDOLPH COLLIER

WILLIAM E. COOMBS

LOU CUSANOVICH

GEORGE DEUKMEJIAN

DONALD L. GRUNSKY

GEORGE MILLER, JR.

JAMES R. MILLS

NICHOLAS C. PETRIS

JACK SCHRADER

STEPHEN P. TEALE

WILLIS L. CULVER, *Consultant*

March 1968



Published by the
SENATE
OF THE STATE OF CALIFORNIA

ROBERT H. FINCH
President of the Senate

HUGH M. BURNS
President pro Tempore

J. A. BEEK
Secretary

LETTER OF TRANSMITTAL

March 20, 1968

HONORABLE ROBERT H. FINCH, *President*
and MEMBERS OF THE SENATE

Gentlemen :

We are pleased to submit to the Senate a statistical study of 1967-68 assessment and taxation of inventories in California.

This report was prepared by the State Board of Equalization at the request of the Senate Committee on Revenue and Taxation.

Respectfully submitted,

WALTER W. STIERN, *Chairman*
Senate Committee on Revenue
and Taxation

George R. Moscone, *Vice Chairman*
Clark L. Bradley
Randolph Collier
William E. Coombs
George Deukmejian
Lou Cusanovich

Donald L. Grunsky
George Miller, Jr.
James R. Mills
Nicholas C. Petris
Jack Schrade
Stephen P. Teale

STATE OF CALIFORNIA
STATE BOARD OF EQUALIZATION

THE SENATE COMMITTEE ON
REVENUE AND TAXATION

March 15, 1968

Gentlemen :

Pursuant to the contract entered into on November 7, 1967, we submit herewith a statistical study of 1967-68 assessment and taxation of inventories in California.

This study was conducted by Robert H. Gustafson, the Board's Assessment and Statistical Consultant, with the assistance of Jeff Reynolds, Statistical Methods Analyst II, and Ronald Cole, Assistant Statistician. Ronald B. Welch, Assistant Secretary in charge of the Board's Property Tax Department afforded occasional consultation and contributed materially to the writing of the text and decisions on table format. The board's electronic data processing section provided indispensable help in handling the mass of figures generated during the study.

The full cooperation which the county assessors accorded our staff is gratefully acknowledged.

Yours very truly,

H. F. FREEMAN
Executive Secretary

A STATISTICAL STUDY OF
PROPERTY TAXES ON INVENTORIES
IN CALIFORNIA

STATE BOARD OF EQUALIZATION
PROPERTY TAX DEPARTMENT
SACRAMENTO, CALIFORNIA

I. SUMMARY OF MAJOR FINDINGS

1. The assessed value of inventories on the 1967-68 county assessment rolls, exclusive of livestock, baled cotton, and specially taxed aircraft, was \$2,678,635,000.¹ (Table 1.) Assessments of livestock inventories are estimated to have amounted to \$119,292,000, while assessments of other livestock amounted to \$31,710,000 (Table 4, line A-21).² Baled cotton and certain aircraft, clearly inventory but subject to special taxes rather than the general property tax, are not included in the foregoing total because they are assessed in a different manner.

2. The 1967-68 taxes that were extended on assessments of inventories other than livestock, baled cotton, and specially taxed aircraft are estimated at \$245,658,000. (Table 2.) Inventories of airplanes that were subjected to the special aircraft tax produced revenues of \$1,020,000. Livestock inventories produced \$9,286,000 more, and baled cotton \$183,000. The total taxes billed on these four categories of personal property added up to \$256,147,000. Tax billings on other livestock are estimated at \$2,469,000.

3. Taxes on inventories other than livestock, baled cotton, and specially taxed aircraft account for 6 percent of all tangible property tax levies in the state. (Table 3.) Baled cotton and specially taxed aircraft in inventories each account for tiny fractions of 1 percent, livestock inventories for about a quarter of 1 percent, and other livestock for about a twentieth of 1 percent. These five percentages add to 6½ percent. The corresponding percentages for individual counties range from 2 percent or less in Alpine, Mono, and Plumas Counties to 10 percent in Modoc County.³ (Table 3.)

4. There are much wider variations in the inventory components of tax bases in smaller units of government than in the counties. Within 244 cities for which data were collected (not including the City and County of San Francisco), inventories accounted for as little as a fraction of 1 percent of all property tax levies in some cities and as much as 35 percent in one city. (Table 4, column 3.)

5. About 25 percent of all inventory values are assessed to retailers, a little over 2 percent to service establishments and public utilities, and a little over 72 percent to manufacturers and wholesalers. (Table 5, column 7.) But retailers held approximately 14½ percent of all tangible business personal property; service establishments and public utilities, 41½ percent⁴; and manufacturers and wholesalers, 44½ percent. (Table 5, column 9.)

¹ This figure excludes \$68,000,000 of aircraft in manufacturers' inventories; these aircraft were subjected to the 1½ percent special property tax on a full market value assessment. It also excludes supplies where they were separated on property statements since these do not come within proposed definitions of inventories. A small amount of supplies was unavoidably included because they were not segregated from property statements, but the amount is insignificant. Leased equipment in the hands of lessees was excluded to the extent that it could be identified since this is machinery and equipment under the proposed definitions of inventories which mention property held for rental (if "held" means "in the possession of" rather than "owned by").

² Some of the proposed definitions of livestock include only livestock held primarily for sale, such as beef cattle, and others include all livestock.

³ A reliable division of livestock assessments into inventory and noninventory categories for each county was not feasible. Property statements seldom permit clear-cut distinctions. Moreover, our major studies were conducted in the large metropolitan counties, where livestock is not an important part of the tax base.

⁴ The very high percentage for the service and utility group results in considerable part from a statutory definition that makes telephone, telegraph, and power lines personal property.

6. The significance of inventories and other personal property in the California property tax picture may be summarized as follows:

	1967-68 taxes			
	Amount (000 omitted)		Percent	
A. Estimated levies on tangible property, including noncarrier aircraft, baled cotton, and escaped property added to tax rolls, but excluding levies on land or on land and improvements only-----	\$4,133,118		100.0	
B. Estimated levies on real property, excluding special assessments levied on land only or on land and improvements only -----	3,471,842		84.0	
<div style="text-align: center;"> <i>Taxes on inventories</i> <i>Taxes on other personalty</i> </div>				
<i>(000 omitted)</i>				
C. Estimated levies on various classes of personalty				
(1) State-assessed property --	\$396	\$160,013	160,409	3.9
(2) Other business and farm property (excluding livestock) -----	235,327	178,255	413,582	10.0
(3) Livestock -----	9,286	2,469	11,755	.3
(4) Household personalty ---	--	54,705	54,705	1.3
(5) Boats -----	105	9,400	9,505	.2
(6) Noncarrier aircraft ----	1,020	2,364	3,384	.1
(7) Baled cotton -----	183	--	183	*
(8) Escaped property added to rolls -----	9,830	4,531	14,361	.3
(9) Less exempt personalty other than veterans' included above -----	---	—6,608	—6,608	— .2
Total levies on personalty----	\$256,147	\$405,129	\$661,276	16.0

* Less than 0.05 percent.

II. LIMITATIONS OF THE DATA

As will be more fully explained in the next section of this report, this study was conducted in large part by sampling. By its very nature, sampling produces estimates rather than precisely accurate results. In general, the estimates are most reliable for large aggregates and of lesser reliability for subdivisions of such aggregates.

Thus the statewide estimates are more precise than those for the counties, and those for a county, in turn, are more reliable than those for the cities within the county. Likewise, the figures for industrial groups are less accurate than the statewide figures. The industry breakdown has further limitations arising from the difficulty always encountered in classification of firms engaged in diverse activities.

The inventory data have been collected and processed with great care. For 26 counties where intensive studies were conducted, a high degree of accuracy is claimed.¹ These counties contain over 80 percent

¹ The personal property assessments included in the samples amounted to 44 percent of all business and farm personal property assessments in these counties. The smallest sample for any one county was 32 percent, the largest, 73 percent.

of the locally assessed personal property in the state. Most of the remaining 32 counties are rural, and much of the state's livestock inventory is located within their borders. Although the assessors of most of these counties supplied us with some inventory data, they were not asked to make exhaustive studies. Consequently, our livestock data are of lesser reliability than the data on other types of business personal property.

The data collected in this study are not of sufficient accuracy to serve as the basis for reimbursement of local governments for losses of tax base that would result should the Legislature exempt inventories.

The estimates of household personalty assessments would be even less usable for this purpose than those for inventories; they were based on much smaller samples, and the sampled rolls were for years ranging from 1964 through 1966. The estimates were updated to 1967 and the statewide total is probably fairly accurate, but largely compensating errors in the county data make them unsuitable for reimbursement purposes.

III. DESCRIPTION OF TABLES AND DATA DERIVATION METHODS

TABLE 1 contains estimates of the components of the gross (i.e. before exemptions) tangible personal property assessments of each county. The assessed values in columns 1 through 7 are for general property taxes, whose rates vary from place to place, while those in the last two columns are for special property taxes, whose rates of $1\frac{1}{2}$ percent and $\frac{1}{10}$ of 1 percent, respectively, are uniform throughout the state. Property subject to the general property tax was assessed at 25 percent of the assessors' full value appraisals in all but 10 counties in 1967,¹ whereas noncarrier (general) aircraft and baled cotton were assessed at full value.

All assessments except those for baled cotton were made as of March 6, 1967. The baled cotton tax, however, is more akin to a production tax than a conventional property tax; it is imposed on each bale of cotton as it leaves the gin.

All the figures in columns 5, 7, 8, and 9 and those for a few counties² in columns 1 to 4 and 6 are actual totals of the individual assessments on county tax rolls. Most of the remaining figures are estimates based on samples.

The figures in column 1 were derived largely from the samples drawn from assessment rolls for our latest intercounty equalization surveys, updated for population growth as estimated by the Department of Finance. Exceptions to this general rule were made in Alameda, Los Angeles, San Francisco, San Mateo, and Stanislaus Counties, whose assessors supplied data that were either precisely accurate or

¹ Fresno, 23 percent; Humboldt, 24 percent; Imperial, 23 percent; Inyo, 21 percent; Marin, 23 percent; Napa, 22½ percent; Sacramento, 23.8 percent; Siskiyou, 23 percent; Stanislaus, 20 percent, and Trinity, 20 percent.

² San Diego, San Luis Obispo, and Tuolumne Counties. The Mendocino, Merced, and Stanislaus County Assessors supplied tabulated totals that were very helpful but required some adaptation for use in this table.

obviously more reliable than the estimates derived from the intercounty equalization samples.

The figures in column 2 were supplied by the assessors for 33 counties. These counties were divided into two groups—coastal and delta counties and inland counties. An average assessed value per registered boat, as reported by the state boat registration agency, was computed for each group. The applicable average was then multiplied by the number of registered boats reported for each of the 25 counties for which no assessed value totals were obtained, after classifying these 25 counties into the same two groups. The assessor-supplied data accounted for 92 percent and the estimated figures accounted for 8 percent of the total assessed value shown in this column.

Since the study was designed primarily for the purpose of gauging the tax contributions of inventories, the figures in column 3 were estimated with great care and are believed to be highly accurate in the aggregate and for a majority of the counties. These figures include both state-assessed inventories, consisting entirely of gas in storage, and locally assessed inventories. The state-assessed inventory data are actual tabulations of individual assessments. The locally assessed inventories, except for the counties mentioned in footnote 2, were estimated by a variety of methods.

In 26 counties containing 82 percent of the assessed value of all locally assessed personal property, stratified random samples of all 1967 personal property assessments over \$1,000 were drawn and expanded in proportion to sampling rates in the respective strata. The small amount of assessed value of personal property left over after the personal property total on each county's local roll was reduced by the estimated assessed value of household personalty, boats, and personal property assessments over \$1,000 in the county was then divided between inventories, livestock, and other locally assessed personalty in the proportions found in the random sample of the county's personal property assessments of \$1,000 to \$9,999.³

Assessors of all but seven⁴ of the other 32 counties of the state were requested to report in detail their personal property assessments above specified dollar amounts, such amounts being larger in big counties than in small ones. Eighteen assessors responded to this request. For the responding counties, the assessed values of inventories below the reporting limits were then estimated by comparison with one or more of the 26 counties whose personal property assessed values had been sampled. For the seven counties that did not respond in a manner that permitted us to process the data,⁵ whose aggregate personal property assessments on local rolls amounted to 2 percent of the statewide total, the locally assessed inventory figure was estimated by deducting the household personalty, boat, and livestock assessments from total locally assessed personal property and dividing the remainder between inventories and other locally assessed personalty by comparison with one or more of the 26 sampled counties.

³ The resulting aggregates for inventories and for other nonagricultural business personalty were compared with data for the current or prior year supplied by the assessors of Alameda, Marin, Orange, and San Mateo Counties and were found to be so reliable that they were used instead of the assessor-supplied data. Since the samples had to be used for other aspects of the study, we deemed it advisable to use them for all phases.

⁴ Alpine, Mendocino, Merced, San Diego, San Luis Obispo, Stanislaus, and Tuolumne Counties. See footnote 2.

⁵ Imperial, Inyo, Mariposa, San Benito, Santa Barbara, Santa Cruz, and Trinity.

Livestock assessments for 26 counties were estimated by the sampling process described above, and the assessors of six other counties supplied adequate assessed value data for this class of property. These figures were then used as the dependent variable in a multiple regression equation in which the independent variables were the numbers of livestock of different kinds as estimated by the California Crop and Livestock Reporting Service for January 1, 1967.⁶ The resulting regression equation was then used to produce a livestock assessed value figure for the other 26 counties. Forty-six percent of the estimated total assessed value of livestock was attributed to the counties for which the regression equation was used as the estimating tool.

At the bottom of this table appears a line labeled "Additions." The figures on this line are estimates of the amount and composition of net additions to the 58 county tax rolls resulting from correction of errors discovered by audits and other means. These totals have not been distributed among the counties because they are based largely on county auditors' reports of additions to and deletions from the 1966-67 rolls.⁷ The corresponding figures for the 1967-68 rolls will not be available for several more weeks.

TABLE 2 shows the estimated "gross" taxes extended on the personal property assessments listed in Table 1. The term "gross tax" is used here to mean the tax that would have been extended had no exemptions other than the householder's personal property exemption been deducted before computing a gross tax and then a tax credit had been deducted as a means of granting the exemption.⁸

For each figure in columns 1 to 6 in Table 1 it was necessary to ascertain or compute a tax rate which represented a fair weighted average of the various local rates applied to the property in question. The totals in column 7 of Table 2 were then derived by addition. Since airplanes and baled cotton are taxed at uniform rates throughout the state, the figures in columns 8 and 9 of Table 2 were readily derived from the assessed value figures in the corresponding columns of Table 1.

The average tax rate on household personalty in each county was computed by estimating the weighted average rate of tax on secured personal property in the county's major population centers. For example, in Sacramento County, the rate selected is an approximation of the average rate at which personal property on the secured roll was taxed in the City of Sacramento and the San Juan School District. In Los Angeles and several other counties, however, where population is widely scattered over many tax rate ("code") areas, the average tax rate for the whole county, both secured and unsecured on both real and personal property, as computed for private car tax purposes (Revenue and Taxation Code, Section 11403) was used. This comprehensive aver-

⁶ Except that numbers of fowls, which are not estimated by the California Crop and Livestock Reporting Service, were taken from the 1964 Census of Agriculture.

⁷ San Francisco's unusually large 1966-67 additions were reduced for this estimate. More current data were obtained from the Los Angeles County Assessor, who estimates that \$91,000,000 of personal property assessments were added to the 1967-68 roll, of which \$61,000,000 represented inventories.

⁸ This usage was necessary because California assessment rolls are written with gross values in the land, improvements, and (except for householder's exemptions) personal property columns, and exempt values deducted as a lump sum. The amount of enrolled personal property that is exempted is negligible except for veterans, whose exemptions usually apply to their homes. If all household personal property were to be exempted, aggregate enrolled veteran's exemptions would be reduced very little and would be applicable in full to real property in most cases.

age property tax rate is referred to hereinafter as the "overall average tax rate."

The average tax rate for boats in each county was assumed to be equal to the overall average tax rate for the county.

The average tax rate on locally assessed inventories in a county was computed by a more involved method. Within each of the 26 counties that were sampled in the course of this study, inventories were allocated among the cities and the unincorporated portion of the county in accordance with the sample findings. Then for each of these areas a weighted average personal property tax rate was computed. If the area was a city that constituted a single tax rate ("code") area, the 1967-68 secured tax rate was weighted by the assessed value of the locally assessed personal property on the secured roll, the 1967-68 unsecured rate was weighted by the assessed value of the locally assessed personal property on the unsecured roll, and a weighted average rate was derived. But if the area covered more than one tax rate area, as all unincorporated portions of counties and many cities do, a rate for each tax rate area that is intermediate between the secured and unsecured rates for that area was used; the intermediate rate was computed as a weighted average, using total assessed values of the locally assessed personal property on the secured roll and on the unsecured roll, respectively, as weights. No rate problem existed for state-assessed inventories, since they are all assessed as secured property.

The same procedure was used for tax rates on livestock and other locally assessed personalty in the 26 sampled counties. Other state-assessed personalty again presented no problems.

The assessors of 18 of the counties that were not sampled supplied us with extensive data on their high-value personal property assessments on the local roll—those over a dollar amount which we specified and which was higher for larger counties than for small ones. The average tax rate on the assessments thus reported to us for inventories was applied to our estimate of the assessed value of all locally assessed inventories; the average rate on reported assessments of livestock (if there were livestock assessments of appreciable magnitude in the data) was used for all livestock; and the average rate on reported other locally assessed personal property was used for all such property.

The assessors of three counties furnished comprehensive tabulations of current assessed values of various classes of personal property, as explained in the description of Table 1. Since these assessments were not broken down by tax rate areas, we had to treat these counties as we did the eight counties for which no personal property assessed value breakdowns were available. The procedure adopted for these counties was to apply their overall average tax rates to the assessed value figures for inventories, a lower rate selected by judgment in the light of actual rates in rural areas and experience gained in the 26 sampled counties to the livestock assessments, and the overall average tax rates to other locally assessed personalty.

TABLE 3 relates the estimated tax levies on various types of personal property to total tangible property tax levies in the 1967-68 fiscal year. The total levies are preliminary versions of those which will be used to compute the 1968-69 rate of the private car tax and will be

published in Table 12 (formerly Table 10E) of the board's Annual Report for 1968-69.

TABLE 4 contains assessment data for all but a few cities in the 26 counties in which the assessment roll was sampled. A few cities with very small or no business communities were not represented in the sample and were therefore omitted from this table.

The figures in column 1 are the assessed values of all property subject to the general property tax—i.e., all taxable tangible property except airplanes and baled cotton (which are seldom found inside cities). These are firm figures reported to us in August 1967 by county auditors.

Column 2 shows the approximate assessed values of inventories and livestock, and column 3 gives the percentage of the tax base which they comprise. Since livestock seldom have a tax situs in a city, these values are almost exclusively contributed by inventories. They are based on samples and hence are subject to sampling error; in general, the smaller the city relative to the county in which it is situated, the less reliable are these approximations. The approximate assessed values in column 4 are those based on samples and are subject to the same limitations as those in column 2. Since there are very few farms within city limits, the amounts in this column represent mainly business machinery, equipment, and supplies.

The column 5 figures are exact totals of state-assessed personalty, consisting largely of telephone, telegraph, and power lines but including also a considerable variety of other personalty of railroads, telephone and telegraph, electric and gas, and other state-assessed utilities.

In columns 6, 7, and 8 appear estimates of the taxes on the three personal property groupings whose assessed values are shown in columns 2, 4, and 5. These estimates were made in the manner detailed above in the description of Table 2. *The taxes shown here are for all levels of government, not just for cities.*

The assessed values on the line labeled "Additions" in Table 1 were not distributed among cities.

TABLE 5 provides an industry breakdown of inventories and of other business personal property in the 26 counties which were sampled for this study and the 18 counties whose assessors supplied usable inventory data. The sample items were expanded in proportion to sampling rates, but no additions were made in the industry figures for assessments in the 32 unsampled counties.

Column 2 contains the assessed values of inventories of firms in each industry group. Column 3 shows what percentage inventories comprise of the personal property assessments of a given industry. Figures in column 4 represent the amount of assessed value of other business personal property. Column 5 then shows the percentage that this other property makes up of the industry's total personal property assessments. (The percentages in columns 3 and 5 will always add to 100 percent for any one industrial group.)

In column 7, each industrial group's percentage contribution to the total assessed value of inventories in the 26 counties is tabulated. Comparable figures for other business personal property will be found in

column 8 and for all business personal property in column 9. Columns 7, 8, and 9 total to 100 percent of the assessed values allocated by industrial groups.

Column 10 shows how much each industrial group, to the extent that we were able to allocate assessed values to industries, contributed to the total assessed value of tangible personal property in the whole state.⁹

On lines A3 to 6 and B1 and 2 are entered the personal property assessments not allocated to industrial groups.

⁹ The very large percentage for state-assessed utilities results in considerable part from an unusual statutory definition that makes telephone, telegraph, and power lines personal property. For this one group, figures are precise rather than estimates.

TABLE 1

Distribution of Gross Assessed Values of Tangible Personal Property for the 1967-68 Fiscal Year, by County (Baled Cotton and Noncarrier Aircraft Assessed at Market Value; Other Property at 25 Percent of Market Value in All but 10 Counties)
(in thousands)

County	Assessed value of tangible personal property							Market value	
	Household personalty	Boats	Inventories	Live-stock	Other state-assessed	Other locally assessed	Total state and locally assessed	Non-carrier aircraft ¹	Baled cotton ²
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1 Alameda.....	46,864	9,410	176,610	2,935	79,908	99,920	415,647	10,217	--
2 Alpine.....	14	2	32	50	215	32	345	--	--
3 Amador.....	302	30	1,502	270	2,377	2,812	7,293	24	--
4 Butte.....	4,216	302	10,350	1,667	18,618	13,664	48,817	1,019	--
5 Calaveras.....	354	39	898	400	3,722	2,250	7,663	132	--
6 Colusa.....	730	46	4,922	1,189	4,161	4,803	15,851	575	--
7 Contra Costa.....	--	4,903	91,063	1,806	43,246	45,724	186,742	2,951	--
8 Del Norte.....	260	435	2,207	71	1,969	1,905	6,847	169	--
9 El Dorado.....	1,882	250	3,289	362	8,746	3,860	18,389	802	--
10 Fresno.....	8,541	948	52,676	6,640	53,996	38,164	160,965	5,388	53,517
11 Glenn.....	364	55	3,069	2,525	4,835	5,044	15,892	392	--
12 Humboldt.....	1,013	578	16,938	1,941	13,305	10,584	44,359	637	--
13 Imperial.....	1,004	248	6,412	7,528	5,548	8,854	29,594	1,146	12,500
14 Inyo.....	--	41	1,052	474	3,335	1,578	6,480	697	--
15 Kern.....	6,132	650	37,480	11,418	54,926	39,208	149,844	6,218	48,898
16 Kings.....	1,637	75	8,430	2,963	11,011	10,183	34,299	1,136	--
17 Lake.....	1,922	288	889	215	4,099	1,560	8,973	203	--
18 Lassen.....	281	96	1,590	1,133	3,328	1,784	8,212	185	--
19 Los Angeles.....	120,000	*31,104	1,176,574	3,065	508,117	789,026	2,627,886	*122,958	--
20 Madera.....	1,449	107	6,366	2,289	8,796	4,626	23,633	431	7,889
21 Marin.....	1,630	3,393	9,874	1,200	16,184	9,233	41,514	513	--
22 Mariposa.....	71	8	758	608	1,579	1,137	4,161	30	--
23 Mendocino.....	1,090	407	5,065	1,222	8,676	7,597	24,057	770	--
24 Merced.....	2,315	221	8,080	7,587	15,316	12,120	45,639	1,109	5,006
25 Modoc.....	397	33	1,048	2,240	3,889	1,622	9,229	124	--
26 Mono.....	197	35	476	81	1,766	796	3,351	140	--
27 Monterey.....	14,955	1,276	19,172	3,868	23,392	16,961	79,624	2,465	--
28 Napa.....	4,238	289	7,719	683	7,922	4,384	25,235	909	--
29 Nevada.....	1,930	119	1,615	44	5,516	2,037	11,261	366	--
30 Orange.....	40,850	11,821	143,793	2,075	107,988	109,806	416,333	5,804	--

TABLE 1—Continued

County	Assessed value of tangible personal property							Market value	
	Household personalty	Boats	Inventories	Livestock	Other state-assessed	Other locally assessed	Total state and locally assessed	Non-carrier aircraft ¹	Baled cotton ²
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
31 Placer.....	2,992	434	4,906	672	14,305	6,012	29,321	449	--
32 Plumas.....	961	97	913	232	4,597	1,374	8,174	169	--
33 Riverside.....	15,366	450	37,697	9,555	51,413	33,174	147,655	3,606	6,913
34 Sacramento.....	34,952	5,153	52,209	2,279	44,479	60,026	199,098	3,703	--
35 San Benito.....	891	21	2,354	1,217	3,591	5,492	13,566	232	--
36 San Bernardino.....	20,125	1,686	67,713	8,672	98,219	34,102	230,517	5,731	--
37 San Diego.....	67,800	9,918	86,470	4,856	95,243	76,937	341,224	9,417	--
38 San Francisco.....	9,658	2,606	103,670	--	61,709	133,086	310,729	--	--
39 San Joaquin.....	18,137	1,366	47,295	5,269	31,580	51,752	155,349	2,099	--
40 San Luis Obispo.....	--	692	5,129	3,032	15,736	10,697	35,286	795	--
41 San Mateo.....	50,529	1,884	70,177	256	39,094	115,250	277,190	6,796	--
42 Santa Barbara.....	6,898	2,091	19,692	2,591	24,924	21,067	77,263	2,425	--
43 Santa Clara.....	51,232	1,358	139,268	2,461	70,630	93,147	358,096	9,660	--
44 Santa Cruz.....	--	795	9,147	1,056	10,580	9,910	31,488	916	--
45 Shasta.....	474	744	7,333	1,554	18,806	23,003	51,914	1,888	--
46 Sierra.....	295	9	310	100	886	310	1,910	--	--
47 Siskiyou.....	1,970	152	4,102	1,728	8,767	4,510	21,229	396	--
48 Solano.....	3,639	70	8,520	1,879	16,886	14,081	45,075	258	--
49 Sonoma.....	1,641	1,838	12,446	8,172	22,275	12,099	58,471	1,601	--
50 Stanislaus.....	8,642	651	18,972	10,000	13,093	22,271	73,629	1,711	--
51 Sutter.....	1,560	211	5,838	768	8,520	9,381	26,278	512	--
52 Tehama.....	1,148	97	2,973	2,527	9,250	8,190	24,155	633	--
53 Trinity.....	219	51	812	35	3,062	992	5,171	115	--
54 Tulare.....	7,541	422	18,382	10,103	34,733	20,556	91,737	2,220	25,765
55 Tuolumne.....	377	58	2,009	507	3,685	1,869	8,505	246	--
56 Ventura.....	5,649	1,366	23,243	1,339	38,103	33,363	103,063	1,749	--
57 Yolo.....	3,716	261	17,132	949	11,943	18,499	52,500	793	--
58 Yuba.....	1,069	88	2,780	644	7,542	5,095	17,218	339	--
Total.....	582,119	101,808	2,571,441	151,002	1,790,087	2,077,519	7,273,976	225,969	183,435
Additions.....	--	--	107,194	--	--	52,752	159,946	--	--
Grand total.....	582,119	101,808	2,678,635	151,002	1,790,087	2,130,271	7,433,922	225,969	183,435

¹ Noncarrier aircraft are assessed at their market value and taxed at a rate of 1½ percent.² Cotton is assessed at its full cash value in the baled form and is taxed at a rate of one-tenth of 1 percent.³ Excludes \$1,200,000 for boats in dealers' inventories.⁴ Includes \$68,000,000 for the market value of aircraft in manufacturers' and dealers' inventories.

TABLE 2

Distribution of Gross Tax on Tangible Personal Property for the 1967-68 Fiscal Year, by County (Baled Cotton is Taxed at 0.1 Percent, Noncarrier Aircraft at 1.5 Percent, and Other Property at Rates Set by Local Taxing Jurisdictions)
(in thousands)

County	House- hold personal- ity	Boats	Inven- tories	Live- stock	Other state- assessed	Other locally assessed	Total state and locally assessed	Non- carrier air- craft	Baled cotton
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	
1 Alameda.....	5,375	1,068	19,093	270	8,812	11,069	45,687	153	--
2 Alpine.....	17	--	2	3	13	3	22	--	--
3 Amador.....	17	--	78	16	131	148	392	--	--
4 Butte.....	422	25	852	125	1,516	1,125	4,065	15	--
5 Calaveras.....	35	3	60	24	275	152	549	2	--
6 Colusa.....	56	3	294	62	233	253	931	9	--
7 Contra Costa.....	--	549	8,832	157	4,472	4,706	18,716	44	--
8 Del Norte.....	28	33	196	6	175	180	623	3	--
9 El Dorado.....	160	21	271	27	709	317	1,505	12	--
10 Fresno.....	991	80	4,787	469	4,572	3,076	13,975	81	53
11 Glenn.....	25	3	201	148	290	285	952	6	--
12 Humboldt.....	101	54	1,514	162	1,211	942	3,984	10	--
13 Imperial.....	90	21	555	604	463	767	2,500	17	12
14 Inyo.....	--	4	65	28	241	97	435	10	--
15 Kern.....	613	55	3,040	791	4,412	3,215	12,126	93	49
16 Kings.....	139	6	696	203	838	777	2,659	17	23
17 Lake.....	115	17	72	13	248	91	556	3	--
18 Lassen.....	25	8	141	81	256	145	656	3	--
19 Los Angeles.....	10,452	12,709	105,812	313	47,289	60,764	227,339	21,844	--
20 Madera.....	123	7	437	160	616	317	1,660	6	8
21 Marin.....	163	341	918	90	1,578	988	4,078	8	--
22 Mariposa.....	4	--	40	30	84	61	219	--	--
23 Mendocino.....	104	36	449	98	750	674	2,111	12	--
24 Merced.....	197	19	680	607	1,246	1,021	3,770	17	5
25 Modoc.....	32	2	74	153	279	113	653	2	--
26 Mono.....	11	2	24	3	83	35	158	2	--
27 Monterey.....	1,346	104	1,576	265	1,858	1,360	6,509	37	--
28 Napa.....	389	27	641	50	708	381	2,196	14	--
29 Nevada.....	174	9	135	3	410	161	892	5	--
30 Orange.....	3,505	1,014	12,448	180	9,288	9,505	35,940	87	--
31 Placer.....	269	35	426	49	1,106	573	2,458	7	--
32 Plumas.....	53	4	38	10	219	57	381	3	--
33 Riverside.....	1,368	38	3,319	738	4,376	2,807	12,646	54	7
34 Sacramento.....	3,670	520	5,043	192	4,397	5,709	19,531	56	--
35 San Benito.....	67	1	141	67	204	330	810	3	--
36 San Bernardino.....	1,992	151	6,113	745	8,768	3,111	20,880	86	--
37 San Diego.....	6,441	880	7,670	413	8,424	6,824	30,652	141	--
38 San Francisco.....	858	277	11,393	--	5,430	14,626	32,584	--	--
39 San Joaquin.....	1,995	132	4,599	431	2,943	4,984	15,084	31	--
40 San Luis Obispo.....	--	63	410	274	1,342	968	3,057	12	--
41 San Mateo.....	4,280	160	5,601	25	3,327	8,930	22,323	102	--
42 Santa Barbara.....	642	185	1,729	207	2,161	1,860	6,784	36	--
43 Santa Clara.....	5,077	135	13,584	211	6,954	9,043	35,004	145	--
44 Santa Cruz.....	--	73	835	90	934	905	2,837	14	--
45 Shasta.....	48	60	644	109	1,457	1,869	4,187	28	--
46 Sierra.....	21	1	19	6	62	19	128	--	--
47 Siskiyou.....	181	12	326	114	671	325	1,629	6	--
48 Solano.....	34	6	722	122	1,341	1,247	3,472	4	--
49 Sonoma.....	153	171	1,148	695	2,074	1,171	5,412	24	--
50 Stanislaus.....	907	61	1,789	850	1,198	2,100	6,905	26	--
51 Sutter.....	125	13	389	44	688	620	1,879	8	--
52 Tehama.....	99	6	233	178	669	605	1,790	9	--
53 Trinity.....	14	3	54	2	209	66	348	2	--
54 Tulare.....	716	37	1,634	789	2,963	1,766	7,905	33	26
55 Tuolumne.....	31	5	160	35	296	149	676	4	--
56 Ventura.....	503	114	2,029	102	3,152	2,838	8,738	26	--
57 Yolo.....	372	23	1,561	70	1,017	1,598	4,641	12	--
58 Yuba.....	96	7	236	46	575	397	1,357	5	--
Total.....	54,705	9,400	235,828	11,755	160,013	178,255	649,956	3,389	183
Additions to rolls.....	--	--	9,830	--	--	4,531	14,361	--	--
Grand total.....	54,705	9,400	245,658	11,755	160,013	182,786	664,317	3,389	183

* Under \$500.

† Excludes \$105,000 taxes on boats in dealers' inventories.

‡ Includes \$1,020,000 taxes on noncarrier aircraft in manufacturers' and dealers' inventories.

TABLE 3

Percent of Total 1967-68 Tangible Property Tax Levies Represented by Various Types of Personal Property, by County (Total Levies Exclude Those Applied to Land or Land and Improvements Only, but Include Levies on Noncarrier Aircraft and Baled Cotton)

(in thousands)

County	Household personalty	Boats	Inven- tories	Live- stock	Other state- assessed	Other locally assessed	Total state- and locally assessed	Non- carrier air- craft	Baled cotton
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1 Alameda.....	2%	•	8%	•	4%	5%	19%	•	--
2 Alpine.....	•	--	1	1%	6	1	10	•	--
3 Amador.....	1	•	3	1	5	5	14	•	--
4 Butte.....	2	1%	4	1	7	5	19	•	--
5 Calaveras.....	1	•	2	1	8	5	17	•	--
6 Colusa.....	1	•	7	1	5	7	22	•	--
7 Contra Costa.....	--	•	6	•	3	3	12	•	--
8 Del Norte.....	1	1	6	•	5	5	18	•	--
9 El Dorado.....	1	•	2	•	5	2	11	•	--
10 Fresno.....	1	•	6	1	6	4	17	•	•
11 Glenn.....	1	•	5	4	7	7	23	•	--
12 Humboldt.....	•	•	7	1	5	4	18	•	--
13 Imperial.....	1	•	3	4	3	5	15	•	•
14 Inyo.....	--	•	2	1	7	3	13	•	--
15 Kern.....	1	•	4	1	5	4	14	•	•
16 Kings.....	1	•	5	1	6	6	20	•	•
17 Lake.....	3	•	2	•	5	2	12	•	--
18 Lassen.....	1	•	5	3	10	6	25	•	--
19 Los Angeles.....	1	•	7	•	3	4	16	•	•
20 Madera.....	1	•	5	2	6	3	17	•	--
21 Marin.....	•	1	2	•	3	2	8	•	--
22 Mariposa.....	•	--	3	2	7	5	18	•	--
23 Mendocino.....	1	•	5	1	8	7	21	•	--
24 Merced.....	1	•	3	3	6	5	18	•	•
25 Modoc.....	1	•	3	7	12	5	28	•	--
26 Mono.....	1	•	1	•	4	2	8	•	--
27 Monterey.....	3	•	3	1	4	3	14	•	--
28 Napa.....	3	•	5	•	5	3	17	•	--
29 Nevada.....	3	•	3	•	8	3	17	•	--
30 Orange.....	1	•	5	•	4	4	14	•	--
31 Placer.....	2	•	2	•	6	3	14	•	--
32 Plumas.....	2	•	1	•	7	2	11	•	--
33 Riverside.....	1	•	4	1	5	3	14	•	•
34 Sacramento.....	1	•	4	•	4	5	16	•	--
35 San Benito.....	2	•	4	2	5	8	20	•	--
36 San Bernardino.....	2	•	5	1	7	2	16	•	--
37 San Diego.....	•	•	4	•	4	3	15	•	--
38 San Francisco.....	•	•	6	--	3	8	17	•	--
39 San Joaquin.....	3	•	8	1	5	8	25	•	--
40 San Luis Obispo.....	--	•	2	1	6	4	14	•	--
41 San Mateo.....	3	•	4	•	3	7	17	•	--
42 Santa Barbara.....	1	•	3	•	4	3	12	•	--
43 Santa Clara.....	2	•	6	•	3	4	16	•	--
44 Santa Cruz.....	--	•	•	•	4	3	11	•	--
45 Shasta.....	•	•	3	1	7	9	21	•	--
46 Sierra.....	4	•	3	1	11	3	22	•	--
47 Siskiyou.....	3	•	5	2	10	5	24	•	--
48 Solano.....	•	•	3	•	5	5	14	•	--
49 Sonoma.....	•	•	3	2	5	3	14	•	--
50 Stanislaus.....	3	•	6	3	4	7	21	•	--
51 Sutter.....	1	•	5	1	8	7	22	•	--
52 Tehama.....	2	•	4	3	12	11	32	•	--
53 Trinity.....	1	•	4	•	17	5	28	•	--
54 Tulare.....	2	•	4	2	7	4	19	•	•
55 Tuolumne.....	1	•	3	1	6	3	13	•	--
56 Ventura.....	1	•	3	•	4	4	12	•	--
57 Yolo.....	2	•	8	•	5	8	24	•	--
58 Yuba.....	1	•	4	1	9	6	21	•	--
Total.....	1	•	6	•	4	4	16	•	•
Additions to rolls.....	--	--	•	--	--	--	•	--	--
Grand total.....	1	•	6	•	4	4	16	•	•

• Less than 0.5 percent.

TABLE 4

Total General Property Tax Base Within Selected Cities, Approximate Assessed Values of Selected Types of Personal Property Within Such Cities, and Approximate Tax Extensions of All Levels of Government on Such Assessed Values
(in thousands)

City	Assessed value					Taxes		
	Net total tax base	Inventories and livestock		Other business and farm personality	State-assessed personality	Inventories and livestock	Other business and farm personality	State-assessed personality
		Amount	Percent of tax base					
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Alameda County								
Alameda ¹	97,137	4,652	5	3,189	1,620	530	363	190
Albany.....	23,579	792	3	1,038	989	92	120	118
Berkeley.....	206,042	17,109	8	13,111	6,143	2,328	1,784	848
Emeryville.....	51,334	15,661	31	5,078	2,822	1,138	369	212
Fremont.....	169,082	9,780	6	6,123	7,109	1,118	687	774
Hayward.....	160,972	13,826	9	5,616	5,865	1,559	632	668
Livermore.....	48,492	963	2	1,116	1,327	108	125	171
Newark.....	42,165	5,726	14	2,130	939	679	255	113
Oakland.....	776,082	65,561	8	39,088	30,295	7,562	4,507	3,495
Piedmont ¹	29,200	123	*	452	468	14	62	62
Pleasanton.....	19,339	908	5	751	715	96	80	76
San Leandro.....	207,189	33,196	16	14,406	7,988	2,964	1,282	739
Union City.....	29,451	4,851	17	1,631	1,406	531	177	153
Colusa County								
Colusa City.....	6,143	474	8	376	285	39	31	23
Williams.....	2,314	367	16	75	104	26	5	7
Contra Costa County								
Antioch.....	35,329	1,870	5	1,649	1,083	182	160	105
Brentwood.....	3,365	422	13	357	120	44	37	13
Concord.....	128,469	4,133	3	2,612	4,007	476	301	458
El Cerrito.....	50,919	1,682	3	1,182	1,461	176	123	155
Hercules.....	12,699	245	2	422	206	21	41	19
Martinez.....	35,882	3,423	10	1,639	1,081	310	65	114
Pinole.....	18,232	63	*	309	701	7	32	74
Pittsburg.....	25,378	1,003	4	1,362	1,005	101	138	104
Pleasant Hill.....	41,131	1,773	4	1,908	1,146	202	218	130
Richmond ¹	282,969	33,004	12	20,000	5,919	3,639	1,872	662
San Pablo.....	25,441	882	3	1,013	807	95	109	88
Walnut Creek.....	84,073	3,210	4	3,683	2,869	382	437	342
El Dorado County								
Placerville.....	12,199	672	6	596	903	63	56	84
South Lake Tahoe....	60,142	1,279	2	1,911	1,613	105	157	132
Fresno County								
Clovis.....	11,575	403	3	196	691	34	16	62
Coalinga.....	7,245	572	8	40	344	42	3	26
Firebaugh.....	2,474	62	3	142	121	6	13	11
Fowler.....	2,390	344	14	10	186	30	1	16
Fresno.....	237,932	16,074	7	11,424	11,515	1,798	1,277	1,331
Huron.....	1,299	100	8	100	69	7	7	5
Kerman.....	2,885	116	4	55	223	11	5	21
Kingsburg.....	6,505	765	12	527	230	68	47	21
Reedley.....	9,399	610	6	117	403	55	10	36
Sanger.....	11,331	1,199	11	200	479	101	17	42
Selma.....	9,248	1,036	11	331	437	99	31	42
Glenn County								
Orland.....	4,466	546	12	304	200	46	26	17
Willows.....	7,035	508	7	380	259	43	32	23
Los Angeles County²								
Alhambra.....	138,466	4,634	3	1,252	12,870	416	112	1,163
Arcadia.....	125,489	1,253	1	393	3,710	112	35	338
Azusa.....	46,977	5,867	12	3,965	1,478	624	421	158
Baldwin Park.....	44,575	392	1	3,295	2,799	45	376	321
Bell.....	33,453	62	*	353	1,733	6	33	159
Bellflower.....	79,155	3,426	4	1,787	3,888	335	175	379
Beverly Hills.....	295,134	4,223	1	12,064	5,973	271	776	400

TABLE 4—Continued

City	Assessed value					Taxes		
	Net total tax base	Inventories and livestock		Other business and farm personality	State-assessed personality	Inventories and livestock	Other business and farm personality	State-assessed personality
		Amount	Percent of tax base					
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Los Angeles County²								
—Continued								
Burbank	285,575	38,974	14	16,410	5,329	3,104	1,307	424
Cerritos	28,524	3,067	11	475	1,196	302	47	120
Claremont	41,472	34	*	772	1,998	4	85	221
Commerce	268,023	94,141	35	23,516	7,314	6,286	1,570	492
Compton	107,056	4,442	4	6,026	6,658	498	676	783
Covina	63,770	251	*	2,689	3,346	27	290	361
Cudahy	17,164	2,712	16	3,175	479	230	269	41
Culver City	123,142	18,662	15	9,740	3,233	174	917	303
Downey	190,580	10,259	5	8,593	8,720	925	767	808
Duarte	21,107	4,886	23	2,995	1,053	535	328	115
El Monte	105,455	9,573	9	7,331	4,689	944	718	477
El Segundo	188,218	21,618	11	7,080	3,130	1,779	591	245
Gardena	94,160	4,268	5	3,321	2,755	360	280	233
Glendale	335,362	13,697	4	13,720	6,491	1,199	1,201	525
Glendora	49,863	750	2	247	1,910	82	27	209
Hawthorne	148,640	13,776	9	10,941	3,776	1,281	1,025	354
Hermosa Beach	36,561	2,329	6	717	1,588	232	71	162
Huntington Park	73,320	6,894	9	1,411	3,632	607	124	321
Industry	70,777	13,251	19	7,444	2,442	1,378	757	249
Inglewood	198,244	12,179	6	2,771	5,564	1,102	251	504
Irwindale	25,011	2,020	8	2,439	1,076	190	252	109
La Mirada	52,860	3,122	6	1,574	1,534	319	162	165
La Puente	31,554	46	*	1,317	1,836	5	139	203
Lakewood	133,115	5,737	4	2,186	3,693	492	184	339
Lomita	29,094	224	1	104	1,116	21	10	99
Long Beach ¹	975,751	135,378	14	27,542	29,940	12,371	2,521	2,739
Los Angeles	6,677,425	353,207	5	270,673	158,289	33,066	25,409	14,862
Lynwood	81,262	10,900	13	3,144	2,455	1,002	1,305	215
Manhattan Beach	85,994	2,193	3	1,735	1,703	215	171	167
Maywood	20,591	1,540	7	988	556	135	87	49
Monrovia	66,852	10,513	16	4,028	3,545	1,110	425	365
Montebello	110,054	9,157	8	4,185	6,903	760	347	571
Monterey Park	87,533	3,133	4	3,432	3,576	281	301	313
Norwalk	91,369	1,367	1	2,302	5,227	146	246	566
Palmdale	21,390	492	2	81	1,521	40	7	132
Palos Verdes Estates	47,587	573	1	305	1,295	56	30	128
Paramount	56,668	5,591	10	3,506	2,684	518	324	249
Pasadena ¹	325,844	17,698	5	11,422	7,356	1,716	1,108	708
Pico Rivera	86,385	8,377	10	5,075	3,887	883	535	416
Pomona	152,109	10,264	7	8,100	8,012	1,096	864	844
Redondo Beach	170,211	2,067	1	2,879	5,161	194	270	491
Rolling Hills Estates	29,349	1,524	5	902	574	143	85	53
Rosemead	41,124	975	2	1,154	2,483	88	102	238
San Fernando	31,489	2,823	9	1,744	1,769	250	155	158
San Gabriel	52,045	5,197	10	2,107	2,222	488	198	212
San Marino	54,138	*	*	1,162	976	--	107	90
Santa Fe Springs	98,906	9,833	10	6,768	3,196	989	687	328
Santa Monica	277,922	24,863	9	11,127	10,312	1,865	813	748
Signal Hill	27,382	7,237	26	2,353	1,306	607	197	110
South El Monte	36,731	1,786	5	2,297	1,094	173	223	112
South Gate	134,056	21,578	16	8,299	4,030	1,819	714	344
South Pasadena	53,399	704	1	1,569	1,692	61	136	165
Torrance	388,734	31,287	8	11,902	9,559	2,922	1,110	883
Vernon	245,125	64,785	26	31,169	2,548	5,086	2,470	204
West Covina	111,890	1,243	1	1,305	3,663	130	134	377
Whittier	161,085	7,026	4	5,229	5,450	725	535	604
Marin County								
Belvedere	12,763	150	1	178	142	16	19	15
Corte Madera	22,596	536	2	423	505	61	48	55
Fairfax	13,795	81	1	16	318	8	2	34
Larkspur	23,840	183	1	303	556	19	32	60
Mill Valley	31,473	205	1	739	900	23	82	100
Novato	49,244	724	1	376	1,774	77	40	178
San Anselmo	26,810	199	1	212	768	22	23	85
San Rafael	114,379	4,001	3	4,177	3,397	400	415	326
Sausalito	26,178	709	3	486	470	71	48	48
Tiburon	18,102	52	*	115	355	5	12	39

TABLE 4—Continued

City	Assessed value					Taxes		
	Net total tax base	Inventories and livestock		Other business and farm personality	State- assessed personality	Inven- tories and livestock	Other business and farm personality	State- assessed personality
		Amount	Percent of tax base					
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Nevada County								
Grass Valley.....	7,896	569	7	515	428	51	46	39
Nevada City.....	3,613	321	9	259	211	29	24	19
Orange County								
Anaheim.....	377,285	34,807	9	22,673	10,999	2,942	1,985	935
Brea.....	36,803	2,333	6	1,203	1,250	193	99	105
Buena Park.....	119,818	10,591	9	9,512	3,559	1,022	910	345
Costa Mesa.....	135,509	10,265	8	6,231	5,472	932	565	491
Cypress.....	38,149	282	1	478	2,469	28	48	246
Fountain Valley.....	46,318	489	1	357	1,858	49	35	177
Fullerton.....	208,979	21,027	10	10,840	7,344	1,942	1,001	693
Garden Grove.....	181,269	3,480	2	5,194	7,248	315	468	624
Huntington Beach.....	288,526	5,405	2	4,512	9,041	496	413	790
Laguna Beach.....	50,818	1,113	2	475	1,614	90	39	127
La Habra.....	68,142	3,886	6	2,115	2,443	390	212	247
La Palma.....	14,163	454	3	85	306	45	8	30
Los Alamitos.....	15,638	1,016	6	644	615	98	59	59
Newport Beach.....	206,801	5,165	2	7,548	3,912	423	617	317
Orange.....	136,286	3,409	3	3,947	6,153	321	371	565
Placentia.....	34,502	155	*	463	1,262	14	42	112
San Clemente.....	44,530	633	1	589	1,518	58	54	134
San Juan Capistrano.....	10,590	431	4	227	661	45	23	70
Santa Ana.....	286,518	26,693	9	17,301	12,257	2,004	1,306	924
Seal Beach.....	65,523	355	5	883	2,242	31	77	199
Stanton.....	29,480	902	3	695	1,243	81	55	109
Tustin.....	27,012	838	3	1,315	739	77	121	64
Villa Park.....	5,227	40	1	83	197	4	8	18
Westminster.....	79,626	1,404	2	3,131	4,994	135	299	458
Placer County								
Auburn.....	14,724	609	4	856	803	57	82	78
Colfax.....	1,678	206	12	5	114	18	—	10
Lincoln.....	5,140	562	11	147	177	49	13	16
Rocklin.....	6,371	158	2	881	303	15	84	29
Roseville.....	33,964	1,384	4	1,320	1,715	125	119	151
Riverside County								
Banning.....	18,785	977	5	1,232	618	97	122	62
Beaumont.....	8,171	160	2	220	505	14	20	47
Blythe.....	11,099	171	2	388	578	15	35	52
Coachella.....	6,012	312	5	359	240	30	75	23
Corona.....	59,940	2,813	5	1,320	2,280	247	116	205
Desert Hot Springs.....	10,935	276	3	24	356	21	2	28
Elsinore.....	7,810	73	1	11	417	8	1	44
Hemet.....	21,259	1,560	7	673	1,008	155	67	102
Indio.....	26,487	1,346	5	728	770	122	66	71
Norco.....	14,740	336	2	515	902	30	46	80
Palm Springs.....	114,344	2,396	2	3,622	4,463	194	204	373
Perris.....	4,850	387	8	51	399	37	5	38
Riverside.....	258,303	20,068	8	9,079	8,527	1,816	823	773
San Jacinto.....	4,746	100	2	35	214	11	4	23
Sacramento County								
Folsom.....	10,137	59	1	72	581	5	6	55
Galt.....	3,372	159	5	76	79	16	7	9
Isleton.....	1,018	150	15	28	59	13	2	5
Sacramento.....	525,905	35,318	7	31,051	19,118	3,491	3,162	2,028
San Bernardino County								
Barstow.....	23,913	1,357	6	491	1,733	146	44	189
Chino.....	25,597	1,381	5	347	1,487	134	34	139
Colton.....	25,724	2,371	9	926	1,730	232	90	169
Fontana.....	28,810	1,188	4	1,110	1,926	117	108	187
Montclair.....	28,805	1,345	5	993	1,187	130	96	115
Needles.....	5,906	311	5	216	454	31	21	43
Ontario.....	89,835	7,603	8	2,603	4,518	756	257	447
Redlands.....	63,168	2,263	4	970	3,523	222	95	343
Rialto.....	36,829	2,354	6	831	2,304	231	81	229

TABLE 4—Continued

City	Assessed value					Taxes		
	Net total tax base	Inventories and livestock		Other business and farm personalty	State- assessed personalty	Inven- tories and livestock	Other business and farm personalty	State- assessed personalty
		Amount	Percent of tax base					
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
San Bernardino County								
—Continued								
San Bernardino.....	191,609	9,450	5	5,977	15,387	953	603	1,566
Upland.....	51,810	1,618	7	1,445	2,506	166	148	256
Victorville.....	20,774	404	2	80	1,947	36	7	170
San Joaquin County								
Escalon.....	4,168	232	6	398	144	22	38	14
Lodi.....	53,225	4,571	9	4,722	940	430	444	89
Manteca.....	18,328	764	4	777	791	73	74	77
Ripon.....	5,353	539	10	1,261	161	51	119	16
Stockton.....	180,518	16,892	9	17,418	7,739	1,868	1,924	859
Tracy.....	22,820	1,731	8	2,992	809	185	318	87
San Mateo County								
Belmont.....	50,184	490	1	1,028	1,099	41	85	93
Brisbane.....	12,704	1,030	8	419	438	92	37	40
Burlingame.....	101,876	8,681	9	5,304	3,261	673	411	254
Colma.....	2,536	65	3	173	299	5	15	25
Daly City.....	119,044	2,365	2	3,200	2,685	220	300	255
Half Moon Bay.....	8,077	100	1	26	297	10	3	31
Hillsborough.....	48,969	25	*	199	746	2	16	60
Menlo Park.....	95,361	3,536	4	7,212	2,352	305	614	212
Millbrae.....	57,454	1,248	2	1,604	1,203	97	125	94
Pacifica.....	49,472	297	1	741	1,893	32	79	204
Redwood City.....	143,523	11,007	8	7,874	3,789	934	668	324
San Bruno.....	72,171	632	1	1,194	1,994	57	106	178
San Carlos.....	84,821	3,957	5	9,279	1,651	297	696	128
San Mateo ¹	209,935	5,316	3	7,500	4,796	456	643	412
South San Francisco.....	156,803	21,710	14	19,064	3,325	1,652	1,451	255
Santa Clara County								
Campbell.....	41,649	4,840	12	1,562	1,334	483	155	139
Cupertino.....	32,901	528	2	593	1,050	54	60	109
Gilroy.....	19,200	1,848	10	608	856	166	55	79
Los Altos.....	69,050	1,123	2	1,187	1,503	105	111	142
Los Altos Hills.....	24,260	--	*	517	505	--	51	51
Los Gatos.....	49,305	1,276	3	1,778	1,641	129	175	169
Milpitas.....	43,646	3,551	8	1,334	1,353	380	143	146
Morgan Hill.....	9,900	1,630	16	511	638	149	47	59
Mountain View.....	139,564	13,749	10	13,848	4,203	1,312	1,332	410
Palo Alto ¹	229,512	20,851	9	14,032	5,123	2,080	1,409	510
San Jose.....	782,547	58,276	7	21,812	25,148	5,704	2,137	2,577
Santa Clara.....	164,125	9,453	6	10,355	4,145	931	1,020	417
Saratoga.....	63,400	664	1	1,210	1,435	63	116	136
Sunnyvale.....	220,921	12,840	6	11,067	6,670	1,265	1,089	665
Shasta County								
Anderson.....	7,592	303	4	221	440	28	21	42
Redding.....	40,416	3,175	8	3,544	1,639	315	346	167
Solano County								
Benicia ¹	11,365	366	3	889	567	36	88	55
Dixon.....	6,705	556	8	103	198	46	9	17
Fairfield.....	40,392	979	2	4,152	1,881	88	368	164
Rio Vista.....	7,201	341	5	303	272	22	19	18
Suisun.....	3,324	192	6	41	143	16	4	12
Vacaville.....	28,030	1,131	4	1,008	1,040	97	87	90
Vallejo.....	90,792	3,007	3	1,853	3,247	292	180	322
Sutter County								
Live Oak.....	2,565	122	5	46	128	10	4	10
Yuba City.....	25,690	1,823	7	3,017	1,027	141	234	83
Tehama County								
Corning.....	4,867	276	6	380	229	24	33	20
Red Bluff.....	14,069	1,164	8	1,182	872	100	103	76

TABLE 4—Continued

City	Assessed value					Taxes		
	Net total tax base	Inventories and livestock		Other business and farm personalty	State- assessed personalty	Inven- tories and livestock	Other business and farm personalty	State- assessed personalty
		Amount	Percent of tax base					
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Tulare County								
Dinuba.....	9,938	726	7	387	345	71	38	35
Exeter ¹	6,836	136	2	601	394	13	56	37
Lindsay.....	10,716	1,766	16	396	400	172	39	39
Porterville.....	18,863	1,038	6	1,526	1,063	98	144	104
Tulare.....	22,082	1,515	7	1,051	1,286	157	109	136
Visalia.....	51,463	3,409	7	2,877	3,106	311	263	296
Woodside.....	2,207	15	1	299	129	1	29	13
Ventura County								
Camarillo.....	34,426	895	3	843	1,414	81	74	126
Fillmore.....	8,191	260	3	332	377	22	27	31
Ojai.....	13,414	188	1	316	524	18	30	51
Oxnard.....	124,936	7,185	6	5,363	6,596	671	498	573
Port Hueneme.....	13,563	1,022	8	310	519	91	28	46
San Buenaventura.....	112,617	5,128	5	4,642	4,640	448	408	411
Santa Paula.....	25,919	786	3	1,300	1,038	74	122	98
Thousand Oaks.....	65,147	1,158	2	1,739	2,602	105	156	230
Yolo County								
Davis.....	40,097	2,195	5	2,347	1,541	240	257	187
Winters.....	2,508	77	3	94	112	7	9	11
Woodland.....	32,261	3,090	10	3,342	1,057	288	312	97
Yuba County								
Marysville ¹	23,942	1,522	6	1,312	1,353	141	122	125
Wheatland.....	1,231	244	20	32	72	18	2	6

* Less than 0.5 percent.

¹ Since the county tax base was used, the city tax rates for cities doing their own assessing were revised to compensate.

² Detail for the cities of Los Angeles County does not include the assessments for petroleum companies, water companies, airlines, churches, and welfare properties.

³ Detail for cities in San Bernardino County does not include leased equipment.

TABLE 5
Distribution of Gross Assessed Value of Tangible Personal Property for the 1967-68 Fiscal Year, by Industry Class
(in thousands)

Industry class	Inventories		Other personalty		Total ¹ personal property	Percent of total allocated by industry (line 2)			Percent of all personal property ¹
	Amount	Percent of total for the industry (col. 2 - col. 6)	Amount	Percent of total for the industry (col. 4 - col. 6)		Inventories	Other personalty	Total	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
A. Assessments of tangible personal property other than noncarrier aircraft and baled cotton									
1. Allocated by industry class									
(1) Apparel, shoe, and department stores-----	172,421	78.2	48,087	21.8	220,508	7.2	1.3	3.7	
(2) Food stores-----	98,805	60.3	65,134	39.7	163,939	4.1	1.8	2.7	
(3) Eating and drinking places-----	6,336	12.2	45,692	87.8	52,028	2.3	1.3	3.9	
(4) Liquor and drug stores-----	60,581	80.7	14,528	19.3	75,109	2.5	.4	1.3	
(5) Home furnishing and appliance stores-----	50,359	86.0	8,217	14.0	58,576	2.1	.2	1.0	
(6) Farm implement and construction equipment dealers-----	27,136	75.4	8,849	24.6	35,985	1.1	.2	.6	
(7) Building material, hardware, plumbing, electric, paint, and glass stores-----	50,787	90.4	5,408	9.6	56,195	2.1	.2	.9	
(8) Auto, trailer, boat, aircraft, and auto parts dealers-----	41,536	70.1	17,732	29.9	59,268	1.7	.5	1.0	
(9) Office furniture and equipment stores (primarily non-leasing)-----	15,035	73.5	5,415	26.5	20,450	.6	.2	.3	
(10) Other retailers (variety, specialty, nurseries, etc.)-----	88,341	74.5	30,304	25.5	118,645	3.7	.8	2.0	
Subtotal: Retail Group-----	611,567	71.0	249,266	29.0	860,833	25.4	7.0	14.4	
(11) Hotels, motels, and resorts-----	908	2.9	30,695	97.1	31,603	*	.9	.5	
(12) Repair, personal services, and places of amusement-----	23,372	22.8	78,933	77.2	102,305	1.0	2.2	1.7	
(13) Health services-----	4,294	6.3	64,012	93.7	68,306	.2	1.9	1.1	
(14) Public utilities and newspapers									
a. Locally assessed (airlines, radio, and T.V., newspapers, and trucking)-----	9,137	6.0	143,373	94.0	153,110	.4	4.0	2.6	
b. State-assessed-----	5,045	.3	1,790,087	99.7	1,795,132	.2	50.1	30.0	
(15) Associations; fraternal, religious, and social organizations-----	983	1.9	49,509	98.1	50,492	*	1.4	.8	
(16) Business services, including equipment leasing-----	9,202	3.4	259,328	96.6	268,530	.4	7.3	4.5	
Subtotal: Service Group-----	52,941	2.1	2,416,537	97.9	2,469,478	2.2	67.6	41.3	

A. Assessments of tangible personal property other than noncarrier aircraft and baled cotton

1. Allocated by industry class

(17) Manufacturers, wholesalers, and retailers of petroleum products-----	77,639	68.9	35,042	31.1	112,681	3.2	1.0	1.9
(18) Contractors; manufacturers and wholesalers of building material-----	103,003	43.1	135,925	56.9	238,928	4.3	3.8	4.0
(19) Manufacturers and wholesalers of electronics and electrical equipment-----	256,976	71.0	105,196	29.0	362,172	10.7	2.9	6.1
(20) Growers, producers, and wholesalers of farm products, tobacco, and liquor-----	239,465	57.5	191,021	42.5	451,086	10.8	5.4	7.5
(21) Livestock-----	119,292	79.0	31,710	21.0	151,002	5.0	.9	2.5
(22) Manufacturers and wholesalers of drugs and chemical products-----	78,359	69.7	34,083	30.3	112,442	3.3	1.0	1.9
(23) Manufacturers and wholesalers of automotive vehicles and parts-----	54,779	80.1	13,597	19.9	68,376	2.3	.4	1.1
(24) Manufacturers and wholesalers of other transportation equipment-----	220,259	74.2	76,576	25.8	296,835	9.2	2.1	5.0
(25) Other manufacturers and wholesalers-----	571,113	66.6	285,931	33.4	857,044	23.7	8.0	14.3
Subtotal: Manufacturers and Wholesalers Group-----	1,740,885	65.7	909,681	34.3	2,650,566	72.4	25.4	44.3
2. Total allocated by industry class-----	2,405,393	40.2	3,575,484	59.8	5,980,877	100.0	100.0	80.5
3. Unallocated by industry class-----								
(1) Assessments under \$1,000 in sampled counties-----	53,800	49.2	55,720	50.8	109,610	---	---	1.5
(2) Small and medium-sized assessments in counties where limited industry data were obtained-----	64,511	42.4	87,559	57.6	152,070	---	---	2.0
(3) All assessments in counties where no industry data were obtained-----	165,739	47.9	180,553	52.1	346,292	---	---	4.6
(4) Assessments added to local rolls after 7/31/67-----	107,194	67.0	52,752	33.0	159,946	---	---	2.2
4. Total unallocated-----	391,334	51.0	376,584	49.0	767,918	---	---	10.3
5. Other personality-----								
(1) Household personality-----	1,200	---	582,119	100.0	582,119	---	---	7.8
(2) Boats-----		1.2	101,808	98.8	103,008	---	---	1.4
6. Total other personality-----	1,200	.2	683,927	99.8	685,127	---	---	9.2
7. Grand total of assessments other than noncarrier aircraft and baled cotton-----	2,797,927	37.6	4,635,995	62.4	7,433,922	---	---	100.0
B. Assessments of Noncarrier Aircraft and Baled Cotton								
1. Noncarrier aircraft-----	68,000	30.1	157,969	69.9	225,969	---	---	---
2. Baled Cotton-----	183,435	100.0	--	---	183,435	---	---	---

* Less than 0.05 percent.

1 Excluding noncarrier aircraft and baled cotton.

Progress Report to the Legislature
1968 Regular Session

REPORT NO. 1

SENATE COMMITTEE ON WATER RESOURCES
RECREATION AT THE STATE WATER PROJECT

A REVIEW OF THE REPORT OF THE
RECREATION TASK FORCE

MEMBERS OF THE COMMITTEE

GORDON COLOGNE, *Chairman*

MERVYN M. DYMALLY, *Vice Chairman*

JOHN L. HARMER

MILTON MARKS *

JAMES R. MILLS

NICHOLAS C. PETRIS *

H. L. RICHARDSON

ALBERT S. RODDA

HOWARD WAY

LOUIS B. ALLEN, JR., *Consultant*

KAY COLEMAN, *Secretary*

* Committee membership terminated January 31, 1968.

James Q. Wedworth appointed January 31, 1968.

James E. Whetmore appointed January 31, 1968.



Published by the
SENATE
OF THE STATE OF CALIFORNIA

HON. ROBERT H. FINCH
President of the Senate

HON. HUGH M. BURNS
President pro Tempore

JOSEPH A. BEEK
Secretary of the Senate

LETTER OF TRANSMITTAL

CALIFORNIA LEGISLATURE
SENATE COMMITTEE ON WATER RESOURCES
February 7, 1968

Hon. Robert H. Finch
President of the Senate
and
Gentlemen of the Senate
Senate Chamber, Sacramento

Mr. President and Gentlemen of the Senate :

Your Senate Committee on Water Resources submits herewith its progress report to the Legislature entitled *Recreation at the State Water Project: A Review of the Report of the Recreation Task Force*.

Additional committee reports regarding the financing of the State Water Project and the funding of nonreimbursable project costs will be submitted in the near future.

Respectfully submitted,

GORDON COLOGNE, *Chairman*

MERVYN M. DYMALLY,

Vice Chairman

JOHN L. HARMER

MILTON MARKS

JAMES R. MILLS

NICHOLAS C. PETRIS

H. L. RICHARDSON

ALBERT S. RODDA

HOWARD WAY

CONTENTS

	Page
Introduction	7
Davis-Dolwig Act	9
General Considerations	11
Project Scope and Planning	12
Planning and Report Procedures	17
Organization	17
Fish and Wildlife Management	17
Land Acquisition	18
Staging of Facilities	19
Reservoirs	20
Aquatic Recreation Areas	22
Fishing Access Sites	26
Miscellaneous Projects	27
Wildlife Habitat Areas	28
Fisheries Enhancement Channels	28
Fish Hatcheries	28
Ecological Area	31
Appendices :	
1a. Davis-Dolwig Act	35
1b. Senate Resolution No. 53, 1962 Budget Session	40
1c. Senate Resolution No. 54, 1963 Regular Session	40
1d. Assembly Concurrent Resolution No. 54, Resolutions Chapter 109, Statutes of 1965	41

RECREATION AT THE STATE WATER PROJECT

INTRODUCTION

On February 16, 1967, the Administrator of the Resources Agency appointed a task force composed of high-level state officials to conduct a review of the state's program for the development of recreation and fish and wildlife enhancement facilities at units of the State Water Project under the Davis-Dolwig Act.

The task force conducted a six-month review of the state's development program during which time the plans for some 49 recreation and/or fish and wildlife enhancement proposals were reviewed and evaluated. The task force estimated the total capital cost of the proposed development to be approximately \$176.6 million over a 50-year period with \$105.3 of such costs occurring during the first 10 years. Operation, maintenance and replacement costs for the proposed projects were estimated as being in excess of \$5 million annually by the 10th year of development.

Proposed recreation and fish and wildlife enhancement projects along the California Aqueduct have estimated capital outlay costs of about \$43.5 million and the development of recreation facilities at 15 project reservoirs \$133.1 million. The task force made numerous recommendations regarding these proposed projects which were designed to cut costs by either eliminating or scaling down the extent of the proposed development. A substantial portion of the projects to be eliminated if the task force recommendations are implemented occur along the California Aqueduct on the west side of the San Joaquin Valley and in southern California.

The Senate Water Resources Committee held a public hearing on November 14, 1967, to publicly review the task force report and at that time received testimony from the chairman of the task force, the Resources Agency, the various affected departments within the agency, and the general public. This report is based upon the testimony received at that hearing in addition to independent research conducted by the committee. The committee, in this written review of the task force report, will follow the general format utilized by the task force in its report. Before proceeding with this evaluation, however, it is well to remember the premises upon which the task force conducted its evaluation and arrived at its conclusions and recommendations. In general, the task force followed 10 guiding principles:

- "1. That the basic premise under which the task force carried out its assignment is economy of both capital costs and those of operation and maintenance consistent with a program which can be financed and which will come the closest to meeting the growing needs of outdoor California.
2. That recreation projects under the Davis-Dolwig program be operated and maintained by local agencies wherever possible. State operation and maintenance should be limited to those areas having unusual value or of particular interest to the state.

TABLE 1
RECREATION AND FISH AND WILDLIFE ENHANCEMENT FEATURES—STATE WATER PROJECT
 Summary of Costs as Preliminarily Planned to Date

Type of project	Number planned	Land costs	Development costs		Annual operation and maintenance costs		
			10 years	50 years	1st year	10th year	50th year
Reservoirs.....	15	\$7,863,000	\$68,212,000	\$125,194,000	\$2,840,000	\$4,027,000	\$7,995,000
Aquatic recreation areas.....	7	2,207,000	12,447,000	19,920,000	433,000	844,000	1,092,000
Fishing access sites.....	16	495,000	1,096,000	2,468,000	67,000	115,000	172,000
Miscellaneous.....	11	3,747,000	9,202,000	14,665,000	50,000	84,000	117,000
Totals.....	49	\$14,312,000	\$90,957,000	\$162,247,000	\$3,390,000	\$5,070,000	\$9,376,000

TOTAL COSTS—ALL PROJECTS—LAND AND DEVELOPMENT, \$176,559,000

3. That projects, local in nature such as fishing access sites along the aqueduct, be developed only after a fishery has been established and after local operation and maintenance has been assured.
4. That some reservoir development, which is appropriate for local operation and maintenance, should be given priority when contracts for such local operation and maintenance have been concluded.
5. That, where appropriate, federal agencies such as the National Forest Service be encouraged to assume operation and maintenance of recreational facilities at project reservoirs.
6. That staging and installation of facilities be based on a demonstrated demand rather than projections of use; and that sizing and staging of additional facilities be based on a demonstrated demand of the average recreation season weekend, rather than peak holiday weekends or special occasions such as the opening of trout season.
7. That only those recreation and fish and wildlife projects which are located in land or water areas of the State Water Project be considered for project participation. Those projects which could be built irrespective of the existence of the State Water Project are not, in the opinion of the task force, appropriate for inclusion as a project feature.
8. That fish and wildlife management, with particular reference to fish planting, should be on comparable standards with other waters and wildlife areas of the state. Scores of other reservoirs built by local government, federal agencies and private industry all are an integral part of the overall state program offering equal fishing and recreation opportunities.
9. That every effort should be made consistent with proper project operation and the greatest economic public benefit to encourage private participation in appropriate developments.
10. That, in planning for recreation development, types of proposed public facilities which would tend to compete with established private facilities in the area should be examined in light of unnecessary public costs and the effect on the economy of the area."¹

DAVIS-DOLWIG ACT

The basic state policy governing the planning and development of recreation and fish and wildlife enhancement facilities at state water projects is contained in the Davis-Dolwig Act.²

Prior to the passage of the Davis-Dolwig Act there was no specific state policy regarding the role of recreation and fish and wildlife enhancement at state-constructed water projects. However, various sections of the Water Code did provide for the planning of recreation and fish and wildlife enhancement facilities and for the acquisition of lands necessary for such purposes.

¹ Report of the Recreation Task Force on the State Water Project, August 1967, pp. 2-3.
² Chapter 867, Statutes of 1961.

Section 233³ required that in the development of plans provision be made for any water or facilities necessary for public recreation and for the preservation and enhancement of fish and wildlife resources.

The Department of Water Resources was also required by Water Code Section 345⁴ to plan for recreation development associated with state-constructed water projects and to acquire lands necessary to implement and execute such plans.

Section 346⁵ also authorized the department to acquire land necessary for recreational development at state-constructed water projects and to use any funds made available to the department, including water resources development funds, for such purposes.

The Burns-Porter Act itself made no provision for the development of recreation and fish and wildlife enhancement as a part of the State Water Facilities nor did it contain any provision regarding the reimbursability or nonreimbursability of any of the costs to be incurred for facilities constructed pursuant to its provisions.

The matter of recreation and fish and wildlife enhancement at the State Water Project was thoroughly reviewed by the Senate Fact Finding Committee on Water Resources in 1959 and 1960. At that time, Director of Water Resources Harvey O. Banks felt that it would be "desirable for the Legislature to establish a clear-cut policy as to the nonreimbursability of recreation and fish and wildlife enhancement costs associated with state-constructed water projects."⁶

The committee agreed with the director that there was, indeed, no clear policy regarding the assignment of project costs and further concluded that "full development of the recreational potential of reservoirs and other suitable facilities of the system is essential to realization of all statewide benefits of the program and intensive study and careful planning will be necessary to realize this potential . . ."⁷ The committee went on to recommend legislation to provide for the allocation of costs among the purposes of the project and to provide for the nonreimbursability of those costs allocated to recreational development and/or fish and wildlife enhancement.

The committee's recommendations were included as a part of the Davis-Dolwig Act which declares recreation and fish and wildlife enhancement to be purposes of state water projects; that land be acquired for such purposes as a part of the land acquisition program for other project purposes; and that facilities for such purposes be completed and available for public use when each project facility is completed.⁸

The Legislature went on to declare that "... costs incurred for the enhancement of fish and wildlife or for the development of public recreation shall not be included in the prices, rates, and charges for water and power, and shall be nonreimbursable."⁹ The Legislature, having recognized that recreation and fish and wildlife enhancement are general public benefits and that the costs associated with such purposes should be funded by them, further declared its intention

³ Chapter 2047, Statutes of 1959.

⁴ Chapter 101, Statutes of 1958.

⁵ Chapter 2143, Statutes of 1959; amended by Chapter 371, Statutes of 1965.

⁶ "Contracts, Financing, Cost Allocations . . . for State Water Development," a partial report of the Fact Finding Committee on Water Resources of the California State Senate, March 1960, p. 63.

⁷ *Ibid.*, p. 10.

⁸ Water Code Section 11900.

⁹ Water Code Section 11912.

that there be included in each budget, beginning with the 1962-63 fiscal year, ". . . an appropriation from the General Fund of the funds necessary for enhancement of fish and wildlife and for recreation in connection with state water projects . . ." ¹⁰

GENERAL CONSIDERATIONS

With this basic policy in mind, we can now review the findings and recommendations contained in the report of the Recreation Task Force on the State Water Project. In reviewing the task force report, the committee does not intend to evaluate or pass judgment upon the merits of individual recreation project proposals. Rather, it is our intention only to evaluate the general policy assumptions contained in the task force report as they apply to particular types of project proposals.

The task force has recognized the rapidly increasing demand for recreational facilities which is occasioned by a number of factors including increased leisure time, increasing affluence, increasing mobility, etc.

The State Water Project offers an unparalleled opportunity for significantly increasing the availability of water-based recreational facilities in areas of the state where such facilities are presently extremely limited. Recreational facilities must be developed at each project unit on a timely basis for, as the task force has correctly pointed out, ". . . the lure of water creates its own demand for recreational facilities." ¹¹

The task force's principal concern was with the extent of facilities proposed for acquisition and development, their timing, staging, and operational arrangements rather than the question of whether or not recreational and fish and wildlife facilities in connection with the project were desirable and in the public interest. It should be noted, however, that the application of certain of the "guiding principles" used by the task force to several types of proposed recreation and fish and wildlife enhancement facilities would result in the elimination of such projects from further consideration.

We feel it would be a mistake to ignore the legislative history on this subject and reverse the intent so clearly expressed in the Davis-Dolwig Act. While the committee does not accept all the conclusions and recommendations of the task force, it is, nevertheless, well aware of the severe financial burdens which would be placed upon the state's General Fund by proceeding immediately with the implementation of the entire program.

A program of recreation and fish and wildlife development requiring an average annual outlay of some \$10 million which is oriented solely toward the State Water Project is beyond the realm of fiscal reality. The State Water Project traverses a large area of the state and conceivably recreational projects could be designed for the entire length of the water project at a cost approaching or exceeding that of the project itself.

It is apparent that the proposed program of recreational development at the State Water Project must be balanced with other recrea-

¹⁰ Water Code Section 11913.

¹¹ Report of the Recreation Task Force on the State Water Project, *op. cit.*, p. 5.

tional programs of the state upon the basis of demand and the need for particular types of facilities in particular locations and in terms of the state's ability to finance all such programs.

It is our recommendation that the proposed program of recreation and fish and wildlife development for the State Water Project be re-examined by the various state departments who will have ultimate responsibility for their operation. It is essential that the cost-benefit ratio and the general needs of the area be considered in relation to the availability of other state-supported recreational facilities. A system of priorities should be established for *all* proposed project-associated recreation and fish and wildlife development.

PROJECT SCOPE AND PLANNING

As previously mentioned, recreation facilities proposed for development at State Water Project units would require a capital investment estimated at \$176.6 million together with attendant operation, maintenance, and replacement costs in excess of \$5 million annually.

As the task force pointed out, plans have been made which are of an exceptionally high scope and envision, in most instances, the development of extremely high-quality facilities. As the task force also points out, the Davis-Dolwig Act specifies that project features are to be developed so as to assure "full utilization" of their inherent potential for recreation and/or fish and wildlife enhancement and directs that such facilities are to be ready and available for public use at the time each unit of the project is completed. While this would appear to justify the level of planning which has occurred, the task force questions the logic of such an approach in view of the obvious funding limitations of state government.¹²

Certainly, there can be no justification for planning and developing elaborate and expensive facilities where a less ambitious and less expensive development plan will provide public recreational facilities which are pleasant, useful, fulfill the recreational needs, and are perfectly adequate to provide a meaningful recreation experience for the user.

The committee does, however, have a basic disagreement with the task force regarding their interpretation of the Davis-Dolwig Act and the types of recreation facilities intended to be developed under that act.

The task force took the position "... that those projects involving direct use of project land and waters, especially reservoir developments be given the highest priority."¹³ It is, of course, true that the reservoir areas offer the best opportunity for the development of mass public recreation facilities because it is there that the greatest demand for facilities will occur.

There are a number of proposed projects, however, which do not involve the direct use of project land and water areas and which might be constructed irrespective of the existence of the project. Some even envision the creation of new additional water areas strictly for recreation purposes. *It is the belief of this committee that the Legislature intended that the Davis-Dolwig Act be used to secure the development*

¹² *Ibid.*, p. 9.

¹³ *Ibid.*

recreation and fish and wildlife enhancement facilities wherever the opportunity for such development was present if consistent with a demand for such facilities and if such development or enhancement could best and most economically be secured by being associated with the State Water Project regardless of whether or not such facilities were located on project land and water areas.

While the task force concluded that the Davis-Dolwig Act applies only to "onshore facilities involving the use of project land and water areas" and that "any recreation or fish and wildlife enhancement facility which could be developed without the existence of the State Water Project is not . . . appropriate for inclusion as a project feature . . .,"¹⁴ no such restrictive language is to be found in the act nor can such restriction be logically implied. On the contrary, there is an impressive body of evidence indicating that the Legislature intended a relatively broad application of the act.

Over the past several years at least three resolutions have been introduced and passed by the Legislature in this regard. While resolutions in and of themselves have no legal force or effect, they are indicative of and have been used by the Legislature on many occasions to express legislative intent.

In 1962, the Senate adopted Senate Resolution No. 53, requesting that the State Office of Planning and the Departments of Water Resources, Parks and Recreation, and Fish and Game ". . . conduct a joint study under the chairmanship of the Administrator of the Resources Agency which will develop a coordinated plan for acquisition and development of property for freeway, aqueduct, and recreation uses on the west side of the San Joaquin Valley adjacent to the West Side Freeway . . ."¹⁵

As a result of this resolution a report¹⁶ was prepared setting forth twenty-six potential recreation areas along the California Aqueduct including recreation reservoirs, aquatic parks, and wildlife areas. The report pointed out that time did not permit a detailed evaluation of the feasibility and desirability of any of the possible recreation areas. It went on to recognize that the "primary responsibility for determining engineering feasibility, including geologic studies; the economic justification of each potential development; and for acquiring the recreational land which proves feasible and justified under the State Water Plan lies with the Department of Water Resources, in cooperation with the Department of Parks and Recreation, and Fish and Game. Primary responsibility for construction and operation of general recreation facilities is with the Department of Parks and Recreation under the Davis-Dolwig Act."¹⁷

At this point there were no firm plans for the development of specific recreation facilities along the aqueduct. There were only proposals for which the engineering and economic feasibility was undetermined. It was recommended, however, that ". . . the twenty-six listed water-based recreation potentials for recreation reservoirs, aquatic parks, and wildlife areas be carefully evaluated by the Departments of Water Resources, Parks and Recreation, and Fish and Game, and the Bureau

¹⁴ *Ibid.*, p. 10.

¹⁵ Senate Journal, April 2, 1962, pp. 330-331.

¹⁶ "California's West Side Program," the Resources Agency of California, December 1962.

¹⁷ *Ibid.*, p. 46.

of Reclamation for ultimate development of those found to be needed and feasible, giving emphasis to:

- a. The Lost Hills-Tupman-Buena Vista area;
- b. The Kettleman City area;
- c. The Cottonwood-Poverty Flats area;
- d. Angling access to the aqueduct."¹⁸

The twenty-six areas listed for evaluation as to their potential were the following:

1. Tecuya Reservoir
2. Salt Creek Reservoir
3. Wheeler Ridge Park
4. Buena Vista Reservoir
5. Tupman Aquatic Park
6. Lost Hills Reservoir and Wildlife Area
7. Buttonwillow Aquatic Park
8. Lost Hills Park
9. Avenal Gap Reservoir
10. Los Porteria Reservoir
11. Culebrino Reservoir
12. Kettleman City Reservoirs and Wildlife Area
13. Zapato Reservoir
14. Jacalitos Reservoir
15. Wartham Reservoir
16. Los Gatos Reservoir
17. Cantua Creek Reservoir
18. Cottonwood Aquatic Park and Wildlife Area
19. Garzas Creek Reservoir
20. Poverty Flat Aquatic Park and Wildlife Area
21. Orestimba Reservoir
22. Del Puerto Canyon Reservoir
23. Use of Wasteways
24. Canal Side Wildlife Habitat Development
25. Aqueduct Angling Access Sites
26. Drainage Project Wildlife Areas

The authors of "California's West Side Program" certainly did not contemplate the immediate development of all of the above-mentioned projects. They were listed only because they possessed potential for possible development. It was clearly recognized that "ultimately, many of these potentials must be discarded. Certainly all are not justifiable."¹⁹

Following the submission of the "California's West Side Program" report, the Senate in 1963 unanimously passed Senate Resolution No. 54²⁰ directing the Department of Water Resources in cooperation with the Department of Fish and Game, the Department of Parks and Recreation, and the United States Bureau of Reclamation to carefully evaluate the twenty-six water-based recreation potentials contained in the report including angling access to the aqueduct.

¹⁸ *Ibid.*, p. 48.

¹⁹ *Ibid.*, p. 46.

²⁰ Senate Journal, May 22, 1963, p. 2936.

The resolution further directed the Department of Water Resources to report to the Legislature at the 1965 Regular Session on the desirability, and the engineering and economic feasibility of the 26 possible areas. The Senate in SR 54 also authorized the Department of Water Resources to suggest other recreation projects in addition or as alternates to the twenty-six listed.

As a result of this Senate resolution, the Department of Water Resources conducted an investigation of the twenty-six potential recreation areas as outlined in the resolution and submitted its report in January of 1965.²¹ In this report most of the possible recreation and fish and wildlife developments were for various reasons eliminated from further consideration and others modified to properly reflect their actual recreation potential.

Bulletin No. 154 recommended that the Department of Water Resources acquire land for the Buena Vista Reservoir; Tupman, Kettleman City, and Ingram Creek Aquatic Parks; and fishing access sites at Wheeler Ridge, Buttonwillow, Los Hills, Huron, Three Rocks, Oro Loma, and Sperry Road. The land required for the Corral Hollow fishing access site has already been acquired.

The report also recommended that initial development take place at the Buena Vista Reservoir, the Kettleman City and Ingram Creek Aquatic Parks, and the Wheeler Ridge, Three Rocks, and Sperry Road fishing access sites with the remaining sites being "... developed to meet the increasing recreation demand as that demand materializes."²²

The Legislature through the passage of Assembly Concurrent Resolution No. 54 at the 1965 session of the Legislature²³ specifically endorsed the recommendations contained in Bulletin No. 154, *including the acquisition of lands for and the development of aquatic recreation areas.*

The Legislature in ACR 54 requested the Director of Water Resources "to expedite formulation of plans which will initiate implementation of the recommendations contained in Bulletin No. 154" and further requested him to acquire the recreation sites recommended. This resolution also requested the Director of the Department of Parks and Recreation "to budget for, and to begin the development of these recreational sites at the appropriate time."

Perhaps of greater importance than the simple endorsement of the projects outlined in Bulletin No. 154 is the fact that in ACR 54 the Legislature also specifically declared its intent that these proposed recreational developments should come within the Davis-Dolwig Act.

The resolution stated in part:

"Resolved, That the Legislature, pursuant to the provisions of the Davis-Dolwig Act, declares its intent that necessary funds shall be appropriated to reimburse the Department of Water Resources for acquisition of recreational use sites and to the Department of Parks and Recreation for the development of recreation areas along the California Aqueduct."

In reviewing these three resolutions one must keep in mind that this is not a simple case of one legislative body looking back upon legisla-

²¹ "Potential Recreation Areas Along the California Aqueduct," Department of Water Resources, Bulletin No. 154, January 1965.

²² *Ibid.*, p. 28.

²³ Resolutions Chapter 109, Statutes of 1965.

tion enacted by a previous Legislature and attempting to interpret the intent of that Legislature.

In 1962 the same Legislature which in 1961 passed the Davis-Dolwig Act adopted a resolution directing the development of "... a coordinated plan for acquisition and development of property for freeway, aqueduct, and recreation uses ..."

In 1963, another resolution was adopted stating that the "full development of the recreation and fish and wildlife potentials of the California Aqueduct and associated facilities is in the public interest" and directing that feasibility studies be conducted for twenty-six previously identified areas with recreation potential, including several aquatic recreation areas.

In 1965, the Legislature passed yet another resolution specifically endorsing these projects and declaring its intent to appropriate funds under the Davis-Dolwig Act to secure their acquisition and development.

It appears to this committee that the legislative intent as to the applicability of the Davis-Dolwig Act is clear. It was, in the opinion of this committee, never intended or even implied that Davis-Dolwig projects be limited to those projects involving only the direct use of project land and water areas. Such a strict application of this act would serve to defeat the broad statewide benefits suggested by all the work that has been incorporated in these efforts to date because no meaningful recreation development could occur within the narrow confines of an aqueduct area. This is particularly true as one views the Aqueduct as it moves into the southern part of the state.

The California State Water Project offers an exciting potential for the development of recreation facilities in areas of the state where such potential could hardly exist without the project. It is the opinion of this committee that if an area offering potential for recreation and/or fish enhancement development is located immediately adjacent to or in the general vicinity of project facilities and if the proposed development is feasible and practical, it is within the intent and meaning of the Davis-Dolwig Act as that intent has been clearly expressed by the Legislature.

The Recreation Task Force has applied its *own interpretation* of the intent of the Davis-Dolwig Act to the proposed recreation developments in an attempt to effect economies in the program. The basic intent of governmental policy is established by the Legislature, however, and we hope the expression of intent by the Recreation Task Force is not confused with that which has been clearly expressed by the Legislature.

The task force has taken the obvious and easy way of effecting economies through the elimination of proposed projects. We believe a better way would be to critically examine each of the proposed recreation projects to cut out unnecessary frills and to scale development down to a size which is adequate to meet anticipated demand at a reasonable cost. In certain instances projects might be deferred where recreation demand for the particular type of facility is not shown to justify its immediate development.

PLANNING AND REPORT PROCEDURES

In its review of recreation at the State Water Project, the task force expressed a legitimate concern over the planning and report procedures used by the Department of Water Resources in planning for recreation and fish and wildlife development at project facilities.

The task force recommended that recreation plans should not "... be published and given widespread distribution until the Department of Water Resources finalizes a project" and that "during any hearings, discussions, or office report reviews, it should be made abundantly clear that (the) subject projects are not yet approved or funded."²⁴

The reasoning for this recommendation is that the recreation reports are often times "merely office reports" which may become obsolete as a project is developed. Such reports may receive wide public distribution leading to a generally false assumption on the part of the public that the projects are approved and will be constructed.

The committee endorses the task force recommendation on planning and report procedures but cautions that projects which have been endorsed by the Legislature, such as those mentioned in ACR 54, have assumed a status of being more than "merely office reports" and that the public has a right to expect that these or similar projects will be planned and developed.

ORGANIZATION

The task force also logically concerned itself with coordination of activities related to the planning and development of project-associated recreation and fish and wildlife enhancement features. In doing so they not only recognized the critical importance of close coordination between the affected departments at all stages of planning and development but internal coordination within the departments as well.

In this regard the task force commented that "coordination between the departments has been accomplished more effectively than internal coordination within each of the concerned departments."²⁵ This is at least in part due to the fact staff people assigned to the Department of Water Resources to carry out recreation and fish and wildlife planning functions have been dispersed throughout the several district offices.

The committee endorses the task force recommendations regarding internal organization and urges the affected departments and the Resources Agency to secure the effective implementation of the Task Force recommendations at the earliest possible time.

FISH AND WILDLIFE MANAGEMENT

The committee endorses in principle the task force recommendations regarding the level at which State Water Project areas are to be managed for fish and wildlife enhancement purposes. The committee, like the task force "sees no justification for any special fish and wildlife management in connection with the State Water Project."

The committee does, however, have some reservations regarding the two fish hatcheries recommended to supply fish to State Water Project

²⁴ Report of the Recreation Task Force, *op. cit.*, p. 11.

²⁵ *Ibid.*, p. 12.

facilities. (Please see the section of this report entitled "Miscellaneous Projects" for a discussion of the fish hatchery proposals.)

LAND ACQUISITION

The Recreation Task Force reviewed the Department of Water Resources' policies governing land acquisition for recreation purposes and their policy for acquiring "control strips" around project areas.

The basic recreation land acquisition policy is set forth in the Davis-Dolwig Act and requires "... that the acquisition of real property for such purposes be planned and initiated concurrently with and as a part of the land acquisition program for other purposes of State Water Projects . . ." ²⁶

The task force concluded that this policy was sound insofar as it applies to reservoir areas but questioned its appropriateness in areas adjacent to the aqueduct and suggested that the department might consider delaying recreation land acquisition in such areas.

The committee agrees with the task force that "... the most important action to be taken initially with respect to recreation and fish and wildlife enhancement at the State Water Project is land acquisition based on sound plans." ²⁷ The committee feels, however, that this "most important action" is as equally applicable to aqueduct areas as to reservoir areas. This is particularly important where land may be lost to other uses or price escalation results in the making of an otherwise feasible project infeasible. As the task force points out, "development can always be delayed if funds are extremely tight, with the only clear loss being the time that the delay lasted." ²⁸

This committee can find nothing in the Davis-Dolwig Act which would permit a distinction between reservoir and aqueduct areas for land acquisition purposes. In fact, expressed legislative intent tends to support the committee's position that there is no difference between the two.

In considering the question of land acquisition for recreation and fish and wildlife enhancement purposes it should be kept in mind that the Department of Water Resources is required by the Davis-Dolwig Act to acquire such lands as a part of its program of land acquisition for other project purposes.

It should also be kept in mind that the costs of such land acquisition are already funded by an automatic annual appropriation of \$5 million in state tidelands oil and gas revenues to the Central Valley Water Project Construction Fund. All the department has to do is advise the Legislature that it has acquired certain lands for recreation purposes and request that this money be reimbursed. This is accomplished through the passage of a bill such as Senate Bill No. 1046 of the 1967 Regular Session.

It is the recommendation of this committee that the Department of Water Resources continue the acquisition of lands for recreation and fish and wildlife enhancement purposes along the California Aqueduct where proposed recreation projects are feasible and practical.

²⁶ Water Code Section 11900.

²⁷ Report of the Recreation Task Force, *op. cit.*, p. 14.

²⁸ *Ibid.*

STAGING OF FACILITIES

One of the most important areas explored by the task force in their effort to effect economies in the Davis-Dolwig program deals with the staging of facilities. The committee endorses the task force recommendation that "initially constructed recreation and fish and wildlife enhancement facilities should be sized to meet average summer weekend demands—not peak demands. Additional stages of development should not be installed until there is a demonstrated need for them."²⁹

The development of facilities upon the basis of long-range projections or peak demand results in the overbuilding of facilities thereby wasting funds which could better be used in other areas for the development of more essential recreation facilities. The implementation of this task force recommendation will permit more flexibility in the planning and development of recreation and fish and wildlife enhancement facilities and will enable the state to better meet its commitments on a statewide basis.

The committee, however, believes that it is possible to go one step further in the "staging of facilities." While it is unquestionably an absolute necessity that "minimum" or "basic" facilities be developed initially at project reservoirs and that such facilities be ready for public use upon completion of the reservoir, it is our feeling that recreation development along the aqueduct can be staged over an extended period of time.

The opportunities for recreation development along the aqueduct are great as evidenced by the number of plans which have been advanced so far. While the Legislature has decreed that the State Water Project shall "... be constructed in a manner consistent with the full utilization of their potential for the enhancement of fish and wildlife and to meet recreational needs..." and further declared "... that facilities for such purposes be ready and available for public use when each State Water Project having a potential for such uses is completed,"³⁰ the committee believes that these explicit requirements must meet a test of reasonableness and be considered in relation to the state's fiscal ability.

If the term "full utilization" were construed as relating to a project area, the total and complete development of the area would be required regardless of whether or not recreation use would ever increase to a point where such facilities would be fully used. The committee believes such a construction is ridiculous.

It appears only logical that the term "full utilization" must relate to recreation demand. Such a construction not only permits flexibility in the development of a particular project facility but in the development of the entire system as well. This would permit the development of some of the recreation projects proposed along the aqueduct while permitting the "staging or deferment" of others to meet an increasing recreation demand as that demand occurs. This is a more reasonable approach and will result in the most judicious expenditure of the available recreation dollar while at the same time permitting the development of recreational facilities required to meet the needs of California's growing population.

²⁹ *Ibid.*, p. 15.

³⁰ Water Code Section 11900.

RESERVOIRS

Proposals for capital development of recreation facilities at State Water Project reservoirs anticipated the expenditure of approximately \$133 million over a 50-year period with approximately \$76 million occurring during the first 10 years of operation. The estimated annual costs for operation and maintenance of such facilities would approach \$4 million by the 10th year of operation.

The committee believes that considerable savings to the state can be effected through proper planning and development of recreation facilities at project reservoirs. Project reservoirs offer an opportunity

TABLE 2
STATE WATER PROJECT RESERVOIRS

Reservoir projects	Location	Surface area (acres)	Shoreline (miles)	Estimated completion date
Antelope Lake.....	Plumas County.....	930	15	Completed
Dixie Refuge.....	Plumas County.....	900	15	Not scheduled
Abbey Bridge Reservoir.....	Plumas County.....	1,950	12	Not scheduled
Lake Davis.....	Plumas County.....	4,000	32	Completed
Frenchman Lake.....	Plumas County.....	1,580	21	Completed
Oroville Reservoir.....	Butte County.....	15,500	167	1967
Thermalito Forebay.....	Butte County.....	600	10	1967
Thermalito Afterbay.....	Butte County.....	4,550	26	1967
Clifton Court Forebay.....	Contra Costa County.....	2,500	9	1969
Bethany Forebay.....	Contra Costa County.....	161	4	1967
Del Valle Reservoir.....	Alameda County.....	1,075	16	1968
San Luis Reservoir.....	Merced County.....	13,800	65	1967
O'Neill Forebay.....	Merced County.....	2,000	14	1967
Los Banos Creek Detention Reservoir	Merced County.....	623	12	Completed
Pyramid Reservoir.....	Los Angeles County.....	1,316	21	1972
Castaic Reservoir.....	Los Angeles County.....	2,630	34	1970
Cedar Springs Reservoir.....	San Bernardino County.....	988	13	1971
Perris Reservoir.....	Riverside County.....	2,000	16	1971
Total.....	57,103		

for the state to provide recreation facilities to serve the requirements of large numbers of people at a cost which, comparatively speaking, is substantially less than that which would occur should land be acquired and facilities developed to provide for a similar volume of recreation use elsewhere.

The task force in developing its report was cognizant of the fact that "most outdoor recreation is water oriented" and that reservoirs will be used by the public for recreation regardless of whether or not facilities are specifically provided for their convenience. The simple fact that a reservoir exists will generate recreation use and demands that we plan for such use. Situations of the type which occurred upon the opening of Frenchman Reservoir to public use must be prevented at other project reservoirs.

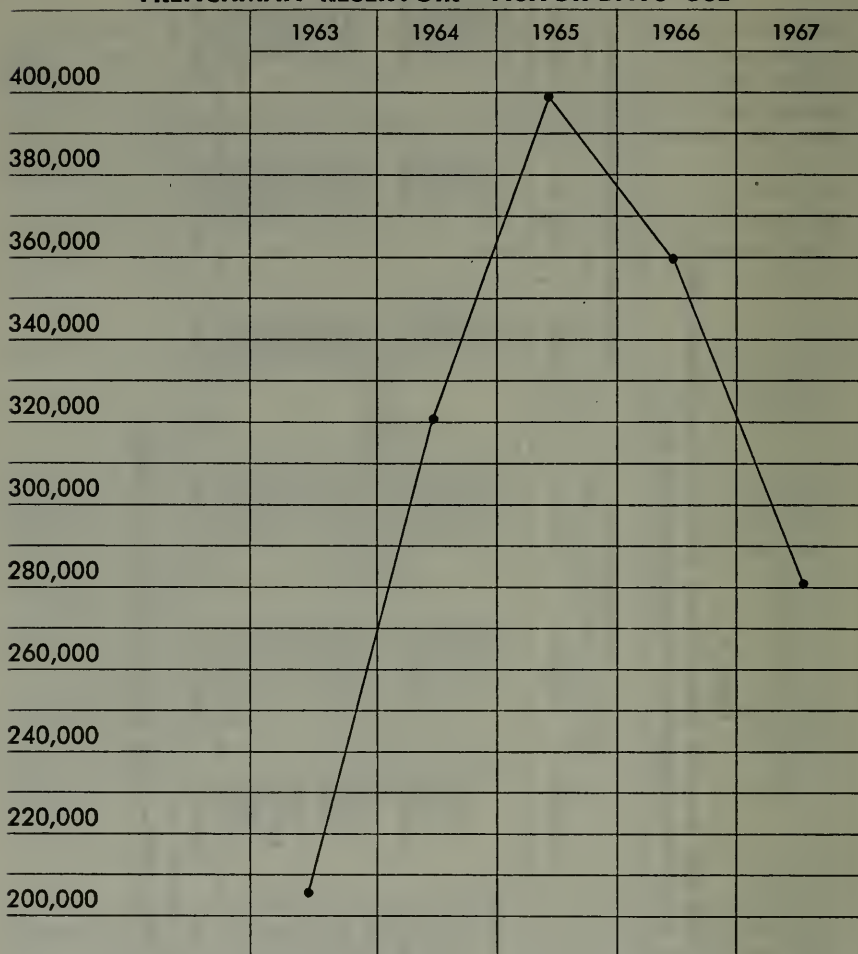
The committee concurs with the task force recommendations that basic facilities such as "... water supply, sanitation, roads and parking, boat ramps when appropriate, and other typical first-stage development be constructed to coincide with the first filling of the reservoir."³¹

³¹ Report of the Recreation Task Force, *op. cit.*, p. 20.

TABLE 3
RECREATION AND FISH AND WILDLIFE ENHANCEMENT FEATURES—STATE WATER PROJECT
Costs of Reservoir Facilities as Preliminarily Planned to Date

Project	Land costs	Development costs		Annual operation and maintenance costs			
		10 years	50 years	1st year	10th year	50th year	
Antelope Lake Recreation Area.....	0	\$450,000	\$1,553,000	\$4,000	\$18,000	\$78,000	
Dixie Refuge Recreation Area.....	0	1,112,000	2,826,000	8,000	23,000	71,000	
Abbey Bridge Reservoir Recreation Area.....	\$69,000	995,000	3,530,000	16,000	49,000	102,000	
Lake Davis Recreation Area.....	96,000	1,760,000	4,243,000	25,000	40,000	197,000	
Frenchman Lake Recreation Area.....	48,000	1,710,000	2,539,000	4,000	32,000	65,000	
Oroville Reservoir—Thermalito Forebay and Afterbay.....	1,852,000	13,157,000	54,404,000	236,000	396,000	1,906,000	
Clifton Court Forebay Reservoir.....			Plans not developed to date				
Bethany Reservoir and Forebay.....	18,000		Plans not developed to date				
Del Valle Reservoir Recreation Facilities.....	201,000	3,198,000	5,719,000	78,000	490,000	1,011,000	
San Luis Reservoir and Forebay.....	180,000	5,025,000	9,575,000	147,000	259,000	1,217,000	
Los Banos Creek Detention Reservoir.....	0	500,000	500,000	9,000	9,000	127,000	
Pyramid Reservoir Recreation Area.....	59,000	4,760,000	4,760,000	30,000	296,000	296,000	
Castaic Reservoir Recreation Area.....	4,730,000	11,618,000	11,616,000	528,000	660,000	660,000	
Cedar Springs Reservoir Recreation Area.....	550,000	6,365,000	6,365,000	525,000	525,000	525,000	
Perris Reservoir Recreation Area.....	60,000	17,564,000	17,564,000	1,230,000	1,230,000	1,740,000	
Totals.....	\$7,863,000	\$68,212,000	\$125,194,000	\$2,840,000	\$4,027,000	\$7,995,000	

TOTAL COSTS—LANDS AND DEVELOPMENT, \$133,057,000

FRENCHMAN RESERVOIR—VISITOR-DAYS USE

USFS—Statistics. Note: Attendance figures are multiplied by 3 to get visitor-days use.

The committee also concurs with the task force regarding the planning for and construction of second stage facilities in that such facilities should be developed upon the basis of actual demonstrated public demand.

In this regard, it is also essential that the principal type of recreation use of a particular reservoir be taken into consideration for the patterns of use for reservoirs which have fishing as their primary attraction is substantially different from the reservoir which has boating or swimming as its primary use. In general, reservoirs which have recreational swimming and boating as their primary recreation activity will experience increasing year-to-year use. Such is not the case, however, where fishing is the primary attraction and public use during the first several years of operation are not valid criterion upon which to plan and develop additional recreation facilities. New reservoirs pro-

vide excellent fishing and thus attract large numbers of fishermen particularly on opening weekends, but as the reservoir ages its ability to produce fish decreases and it becomes less attractive to the fisherman. Thus, recreation use by the fishing public also decreases.

Frenchman Reservoir is a good example of this occurrence and is presently overbuilt because facilities were developed on the basis of use without taking into consideration the fundamental use pattern of reservoirs which primarily attract the fishing public rather than the individual who is seeking general water associated recreation.

During the first year (1963) Frenchman Lake was open, there were 204,000 visitor-days of use. Visitor use climbed sharply to 320,000 days in 1964 and to 400,000 days in 1965. However, such use declined to 360,000 visitor-days in 1966 and to 280,000 days in 1967. While visitor use will undoubtedly level off and gradually climb again, it will probably be many years before recreational use at this reservoir approaches the capacity of the facilities which have already been developed.

This typical trend in the use of reservoirs where fishing is the primary attraction should be taken into consideration in the planning process in order to permit the most judicious use of the available recreation dollar.

AQUATIC RECREATION AREAS

Included in the plans for project associated recreation development reviewed by the Recreation Task Force were proposals for seven aquatic recreation areas involving capital expenditures in excess of \$22 million over a 50-year development period. Approximately \$14.6 million would be expended during the initial ten years of development and annual operation and maintenance costs would approach \$844,000 by the 10th year of operation.

In carrying out its assumption that proposed recreational development under the Davis-Dolwig Act must be located on project land and water areas the task force concluded that "the aquatic recreation areas that have been planned for the State Water Project are not sufficiently integral with the project to be included as a part of it."³²

As pointed out earlier in this report, the committee disagrees with this task force conclusion. The committee believes the legislative intent to be exceptionally clear and feels that the several departments involved in the planning and development of project associated recreation facilities have a mandate from the Legislature to proceed.

Several of the proposed aquatic recreation areas offer an opportunity for the development of water associated recreation in areas where such recreational opportunity is presently nonexistent. The development of such facilities as a part of the State Water Project is clearly appropriate under the Davis-Dolwig Act. (For a detailed discussion of legislative intent see the section of this report entitled "Project Scope and Planning".) The Departments of Water Resources, Parks and Recreation, and Fish and Game should proceed with the planning and development of such project associated recreation facilities.

If the Department of Water Resources disagrees with previously established legislative policy and feels it should be altered to implement task force recommendations, the department should sponsor the

³² *Ibid.*, p. 29.

TABLE 4
RECREATION AND FISH AND WILDLIFE ENHANCEMENT FEATURES—STATE WATER PROJECT
Costs of Aquatic Recreation Area Facilities as Preliminarily Planned to Date

Project	Land costs	Development costs		Annual operation and maintenance costs			
		10 years	50 years	1st year	10th year	50th year	
Ingram Creek Aquatic Recreation Area.....	\$424,000	\$1,515,000	\$2,082,000	\$20,000	\$98,000	\$163,000	
Kettleman City Aquatic Recreation Area.....	93,000	1,538,000	2,695,000	49,000	77,000	179,000	
Tupman Aquatic Recreation Area.....	0	205,000	5,954,000	84,000	159,000	240,000	
Buena Vista Aquatic Recreation Area.....	700,000	7,237,000	7,237,000	124,000	240,000	240,000	
Peace Valley Aquatic Recreation Area.....	470,000	Plans not developed to date		92,000	154,000	154,000	
Ritter Canyon Aquatic Recreation Area.....	360,000	972,000	972,000	36,000	66,000	66,000	
Mojave Mesa Aquatic Recreation Area.....	160,000	980,000	980,000	28,000	50,000	50,000	
Totals.....	\$2,207,000	\$12,447,000	\$19,920,000	\$433,000	\$844,000	\$1,092,000	

TOTAL COSTS—LANDS AND DEVELOPMENT, \$22,127,000

TABLE 5
RECREATION AND FISH AND WILDLIFE ENHANCEMENT FEATURES—STATE WATER PROJECT
 Costs of Fishing Access Facilities as Preliminarily Planned to Date

Project	Land costs	Development costs		Annual operation and maintenance costs			
		10 years	50 years	1st year	10th year	50th year	
Corral Hollow Road Fishing Access-----	\$2,000	\$70,000	\$70,000	\$9,000	\$19,000	\$49,000	
Orestimba Fishing Access-----	31,000	70,000	70,000	8,000	16,000	24,000	
Fairfax Fishing Access-----	23,000	0	70,000	13,000	18,000	18,000	
Three Rocks Fishing Access-----	21,000	70,000	70,000	7,000	14,000	18,000	
Huron Fishing Access-----	38,000	0	70,000	10,000	18,000	18,000	
Lost Hills Fishing Access-----	7,000	0	70,000	6,000	8,000	18,000	
Buttonwillow Fishing Access-----	4,000	0	70,000	5,000	9,000	15,000	
Replacement for Wheeler Ridge Fishing Access-----	7,000	70,000	70,000		13,000		Not estimated to date
Willow Springs Fishing Access-----	5,000	111,000	111,000				Not estimated to date
Foothill Fishing Access-----	75,000	130,000	225,000				Not estimated to date
Quartz Hill Fishing Access-----	145,000	316,000	316,000				Not estimated to date
Barrel Springs Fishing Access and Recreation Area-----	10,000	154,000	154,000				Not estimated to date
Valyermo Fishing Access-----	10,000	--	171,000				Not estimated to date
Llano Fishing Access-----	38,000	--	353,000				Not estimated to date
Phelan Fishing Access-----	39,000	105,000	385,000				Not estimated to date
Antelope Fishing Access-----	40,000	--	193,000				Not estimated to date
Totals-----	\$495,000	\$1,096,000	\$2,498,000	\$67,000	\$115,000	\$172,000	

introduction of appropriate legislation at the 1968 Regular Session to obtain legislative approval of such policy changes prior to effecting any such changes. The committee believes that following recommendations of the task force in conflict with what is established legislative intent would be inappropriate.

FISHING ACCESS SITES

The task force in its study also considered development proposals for 16 fishing access sites along the California Aqueduct involving capital costs of \$3 million over a 50-year development period. Initial development costs would approximate \$1.6 million with annual operation and maintenance costs of \$115,000 by the 10th year of development.

The task force concluded that the development of the proposed fishing access sites were within the scope of the Davis-Dolwig Act. The committee agrees with this finding but, like the task force, is somewhat concerned over the apparent large costs for developing these sites. According to the task force, the average fishing access site would open about one mile of the California Aqueduct to fishing at a capital cost of \$156,000.

There are several problems associated with the development of the proposed fishing access sites which have complicated planning for their development and have served to unnecessarily increase development costs.

It appears to the committee on the basis of the experience gained by the Wildlife Conservation Board in the development of this type of facility that the proposed sites for fishing access to the California Aqueduct can be developed with substantially less capital outlay required than the present program envisions. There are several areas, as pointed out by the task force, in which substantial savings to the state can be effected while at the same time permitting the construction and development of fishing access sites which are adequate to serve the needs of the potential user.

One aspect of the proposed fishing access development program which has served to materially increase potential state costs are the proposed plans for the development and construction of fishing access roads. In most instances roads to provide access to the aqueduct for fishermen are proposed to be constructed parallel to service roads already constructed by the Department of Water Resources along the aqueduct for maintenance and operation purposes.

The committee can find no logic whatsoever in constructing such a dual road system. It is inconceivable to the members of this committee that a dual road system could be proposed for construction at the taxpayers' expense when a single road properly planned, designed, and constructed would accommodate both the needs of the Department of Water Resources and the potential recreation seeker.

It is, therefore, the recommendation of this committee that special roads to provide fishing access not be constructed and that Department of Water Resources service roads be used for fishing access purposes.

Use of the Department of Water Resources service roads for fishing access purposes should be planned for as a part of the design of the aqueduct and, where necessary, such roads should be enlarged to ac-

commodate the anticipated fishing use. The use of service roads for fishing access purposes should, of course, be planned so that such use would not interfere with the free movement of service vehicles and maintenance equipment in the event of an emergency.

The committee generally agrees with the other task force conclusion regarding the development of fishing access to the California Aqueduct. It appears only logical that the development of fishing access sites should not take place until after a fishery has become established and that such projects should, where possible, be designed so as to utilize lands already acquired for project purposes rather than buying additional land for such projects. Where additional lands are necessary, however, they should be acquired by the Department of Water Resources pursuant to the Davis-Dolwig Act. It is also the responsibility of the department to provide necessary safety devices at the fishing access sites.

It appears to the committee, as it did to the task force, that the proposed fishing access sites have been designed at a level of quality far beyond that which is necessary to accommodate the needs of the fishing public. The Wildlife Conservation Board has a long-established statewide program for the development of fishing access sites and has obtained considerable experience in the development of such recreation facilities. This experience vividly demonstrates that fishing access sites can be developed at substantially less cost than that which has been proposed for the access sites along the aqueduct.

The committee feels that the interests of the State of California and the fishing public would best be served if fishing access sites along the California Aqueduct were constructed by the Wildlife Conservation Board in accordance with their established policies and procedures and within the board's existing authorization. Such a change would prevent a fragmentation of responsibility for the development of fishing access sites and would help assure the continuation of a truly comprehensive and economical fishing access program based upon statewide need.

It is, therefore, the recommendation of this committee that the Davis-Dolwig Act be amended to vest responsibility for the development of fishing access sites along the California Aqueduct in the Wildlife Conservation Board.

MISCELLANEOUS PROJECTS

Reviewed as a part of the Recreation Task Force study were 11 "miscellaneous" projects proposed for development under the Davis-Dolwig Act. These projects involve estimated capital expenditures of \$18.4 million over the 50-year development period with \$12.9 million of such costs occurring during the first 10 years. It should be noted that cost data for three of these proposals have not as yet been developed and are not included in this total.

The committee could not find a history of legislative intent for these "miscellaneous" projects either approving or disapproving their development as a part of the State Water Project under the Davis-Dolwig Act. Whether or not several of these projects should be developed under Davis-Dolwig is a matter of judgment. As pointed out by the task force "many of these projects have merit, and some, such as the

fishery enhancement projects could be accomplished very economically.”³³ These projects should be evaluated and priorities established as previously mentioned.

Wildlife Habitat Areas

The task force reviewed proposals for the acquisition and development of two wildlife habitat areas. However, specific plans had not been developed and cost estimates were unavailable. While the task force felt that these areas were desirable, it was their conclusion that they were not “integral” to the State Water Project and should not be financed under the Davis-Dolwig Act.

This, of course, is a matter of judgment and such projects should not categorically be ruled out. If the wildlife habitat projects have merit, will provide a public benefit, can be accomplished economically and, in the judgment of the administration and the Legislature should be planned, developed, and funded as a part of the State Water Project under the Davis-Dolwig Act, the affected state departments should proceed to accomplish the acquisition of the necessary lands and the development of appropriate facilities.

Fisheries Enhancement Channels

The task force reviewed proposals for the development of three fisheries enhancement channels under the Davis-Dolwig Act and, while they felt that these projects had “considerable merit,” it was their conclusion that they should not be financed under the Davis-Dolwig Act but should be pursued if arrangements could be made with local jurisdictions to finance the water costs. It is noted that the water required for these projects has been reserved from the yield of the State Water Project for this purpose and is available for use in the proposed enhancement channels.

The purpose of the proposed fishery enhancement projects is quite simple. While the Cottonwood Fishing Channel has been eliminated, the remaining enhancement projects consist simply of releasing project water into existing natural channels to stabilize stream flow and/or reservoir levels.

This type of enhancement can provide substantial benefit at a moderate cost and, in the judgment of the committee, appear to be entirely appropriate under the Davis-Dolwig Act.

It should be noted in regard to the Frenchman Flat-Piru Creek Fishery Enhancement project that the Department of Water Resources will be required to release water from Pyramid Reservoir into Piru Creek to protect the presently existing rights of the United Water Conservation District. The accomplishment of substantial fishery enhancement would be economical and easily accomplished.

Fish Hatcheries

The task force reviewed proposals suggested by the Department of Fish and Game for the construction of two fish hatcheries as a part of the State Water Project to supply fish for project reservoirs. The task force concluded that the proposed hatcheries were not sufficiently integral to the project to be considered for construction under the Davis-Dolwig Act.

³³ *Ibid.*, p. 35.

TABLE 6
RECREATION AND FISH AND WILDLIFE ENHANCEMENT FEATURES—STATE WATER PROJECT
 Costs of Miscellaneous Projects as Preliminarily Planned to Date

Project	Land costs	Development costs		Annual operation and maintenance costs		
		10 years	50 years	1st year	10th year	50th year
Feather River Borrow Area.....	Plan \$1,500,000	Plan is not developed to date	Plan is not developed to date	\$7,000	Not estimated to date	Not estimated to date
Peripheral Canal Recreation Areas.....	Plan \$5,110,000	Plan is not developed to date	\$9,973,000		Not estimated to date	\$40,000
Adams Canal Side Habitat Area.....	Plan 0	Plan is not developed to date	0		Not estimated to date	
Cadillac Canalside Habitat Area.....	0	0	600,000		Not estimated to date	
Cottonwood Fishing Channel.....	0	653,000	653,000		Not estimated to date	
Frenchmans Flat—Piru Creek Fishery Enhancement.....	1,380,000	630,000	630,000		Not estimated to date	
Bitter Ridge Ecological Area.....	Plan is not developed to date	Plan is not developed to date	1,059,000		Not estimated to date	
Little Rock Reservoir Fishery Enhancement.....	612,000	1,059,000	1,059,000	43,000	Not estimated to date	77,000
Oro Grande Wash Fishing Access and Aquatic Rec. Area.....	55,000	1,750,000	1,750,000		Not estimated to date	
Hesperia Trout Hatchery.....	200,000	Not developed	1,750,000		Not estimated to date	
Warmwater Hatchery at Mecca.....						
Totals.....	\$3,747,000	\$9,202,000	\$14,665,000	\$50,000	\$88,000	\$117,000

TOTAL COSTS—LANDS AND DEVELOPMENT, \$18,412,000

The task force went on to suggest that additional fish hatcheries should be considered on the basis of statewide need rather than limiting consideration to the needs of the State Water Project. This suggestion has obvious merit but tends to ignore the requirements for hatchery raised fish for the vast new bodies of water contemplated in the State Water Project. Without such fish we would be defeating the policy stated in the Davis-Dolwig Act which requires that opportunities for fish and wildlife enhancement be realized wherever possible.

As was the case in regard to other specific proposals, the committee is not in a position to pass judgment as to the merit of the two hatchery proposals or as to the appropriateness of their construction at this time. The committee does feel, however, that fish hatcheries are a very appropriate part of the Davis-Dolwig program. Obviously, it would be difficult, and in many instances impossible, to achieve any significant degree of fishery enhancement if fish are not available to stock project water areas.

While some species of fish may become established naturally in many of the project reservoirs, a stocking program will most likely be necessary for some of the project units, particularly where such waters will create habitat conducive to the propagation of fish which do not occur naturally in those areas. In the terminal reservoirs and aqueduct areas in southern California such a program will most certainly be an absolute necessity.

The Department of Fish and Game has established a stocking program based upon statewide fish planting requirements, but new bodies of water developed by state, federal and local agencies as well as private utilities, have severely taxed existing hatchery facilities and have limited the ability of the Department of Fish and Game to meet fish planting requirements. Accordingly, the department developed and presented to the Wildlife Conservation Board on January 26, 1965, a proposal for fish hatchery expansion under the State Beach, Park, Recreational and Historical Facilities Bond Act of 1964. The proposed program anticipated a 30-percent increase in the surface acreage of reservoirs over the next 15 years.

The hatchery expansion program, which was approved by the Wildlife Conservation Board and is now well on the way to completion, would increase fingerling trout production by 5,600,000 fingerlings or 34 percent; catchable trout production by 2,000,000 fish or 28 percent; and provided for a new warmwater hatchery capable of producing 100,000 catchable channel catfish annually in addition to fingerlings.

The committee believes the construction of fish hatcheries to be appropriate as Davis-Dolwig projects where they are necessary to provide fish for project waters, even though, admittedly, it is presently unclear to us as to whether or not the hatchery expansion program authorized under the 1964 Recreation Bond Act considered the increase in acreage of surface waters occasioned by construction of the State Water Project.

It is noted, in this regard, that one of the bases upon which the expansion program was justified was that the surface acreage of reservoirs would increase by 30 percent during the next 15 years. The only State Water Project facility specifically mentioned, however, was Frenchman Reservoir.

Certainly, if waters to be developed by the State Water Project were considered in formulating the hatchery expansion program under the bond act, additional hatcheries under the Davis-Dolwig Act cannot be justified at the present time. The construction of the State Water Project, however, should not serve to dilute the Department of Fish and Game's planting program or reduce its effectiveness as this would be contrary to the stated intent of the Davis-Dolwig Act.

If new waters to be developed by the state were not considered in the bond act program, certainly fish hatcheries necessary to supply fish for project waters in order to fully realize their enhancement potential are clearly justified and should be constructed.

Ecological Area

Proposed for acquisition and development under the Davis-Dolwig Act is one ecological area with estimated acquisition and development costs in excess of \$2,000,000. Annual operation and maintenance costs have not, as yet, been estimated.

The Recreation Task Force made a number of recommendations affecting many of the recreation projects proposed under the Davis-Dolwig Act. Their proposal to eliminate the ecological area, as evidenced by testimony before this committee, has aroused the most public opposition.

Whether or not such a proposal is appropriate under the Davis-Dolwig Act is a matter of individual opinion. The act is broad and, certainly, this project could be justified. This, however, is a matter to be decided in accordance with a system of priorities which must be established as suggested in the section of this report entitled "General Considerations."

APPENDICES

DAVIS-DOLWIG ACT

Article 1. State Policy

(Article 1 added by Stats. 1961, Ch. 867)

11900. The Legislature finds and declares it to be necessary for the general public health and welfare that preservation of fish and wildlife be provided for in connection with the construction of state water projects.

The Legislature further finds and declares it to be necessary for the general public health and welfare that facilities for the storage, conservation or regulation of water be constructed in a manner consistent with the full utilization of their potential for the enhancement of fish and wildlife and to meet recreational needs; and further finds and declares that the providing for the enhancement of fish and wildlife and for recreation in connection with water storage, conservation, or regulation facilities benefits all of the people of California and that the project construction costs attributable to such enhancement of fish and wildlife and recreation features should be borne by them.

The Legislature further finds and declares it to be the policy of this state that recreation and the enhancement of fish and wildlife resources are among the purposes of state water projects; that the acquisition of real property for such purposes be planned and initiated concurrently with and as a part of the land acquisition program for other purposes of state water projects; and that facilities for such purposes be ready and available for public use when each state water project having a potential for such uses is completed.

(Added by Stats. 1961, Ch. 867.)

11901. It is the purpose of this chapter to provide for the planning and construction of water storage, conservation, and regulation facilities and associated fish and wildlife and recreation features consistent with this declaration and to make provision for funds therefor on a continuing basis, and to provide for the operation and maintenance of such fish and wildlife and recreation features.

In enacting this chapter, however, it is not the intent of the Legislature to diminish any existing powers of the Department of Water Resources, the Department of Parks and Recreation, or the Department of Fish and Game, but rather to provide specifically for the preservation and enhancement of fish and wildlife resources and for a system of public recreation facilities at state water projects as part of a coordinated plan for multipurpose use of these projects.

(Added by Stats. 1961, Ch. 867; amended by Stats. 1965, Ch. 93)

Article 2. Definitions

(Article 2 added by Stats. 1961, Ch. 867)

11903. As used in this chapter, "project" means any physical structure to provide for the conservation, storage, regulation, transportation, or use of water, constructed by the State itself or by the State in co-operation with the United States.

(Added by Stats. 1961, Ch. 867)

Article 3. Application
(Article 3 added by Stats. 1961, Ch. 867)

11905. The provision of this chapter shall apply to the Central Valley Project and every other project constructed by the State itself or by the State in co-operation with the United States, including, but not limited to, the State Water Resources Development System.

(Added by Stats. 1961, Ch. 867)

Article 4. Planning and Construction of Projects
(Article 4 added by Stats. 1961, Ch. 867)

11910. There shall be incorporated in the planning and construction of each project such features (including, but not limited to, additional storage capacity) as the department, after giving full consideration to any recommendations which may be made by the Department of Fish and Game, the Department of Parks and Recreation or any division thereof, including but not limited to, the Division of Small Craft Harbors and the Division of Beaches and Parks, any federal agency, and any local governmental agency with jurisdiction over the area involved, determines necessary or desirable for the preservation of fish and wildlife, and necessary or desirable to permit, on a year-round basis, full utilization of the project for the enhancement of fish and wildlife and for recreational purposes to the extent that such features are consistent with other uses of the project, if any. It is the intent of the Legislature that there shall be full and close coordination of all planning for the preservation and enhancement of fish and wildlife and for recreation in connection with state water projects by and between the Department of Water Resources, the Department of Parks and Recreation, the Department of Fish and Game, and all appropriate federal and local agencies.

(Added by Stats. 1961, Ch. 867; amended by Stats. 1965, Ch. 93.)

11910.5. Such recreational purposes include, but are not limited to, those recreational pursuits generally associated with the out-of-doors, such as camping, picnicking, fishing, hunting, water contact sports, boating, and sightseeing, and the associated facilities of campgrounds, picnic areas, water and sanitary facilities, parking areas, view points, boat launching ramps, and any others necessary to make project land and water areas available for use by the public.

(Added by Stats. 1961, Ch. 867)

11911. The planning for public recreation use and fish and wildlife preservation and enhancement in connection with state water projects shall be a part of the general project formulation activities of the Department of Water Resources, in consultation and co-operation with the departments and agencies specified in Section 11910, through the advance planning stage, including, but not limited to, the development of data on benefits and costs, recreation land use planning, and the acquisition of land. In planning and constructing any project, the department shall, to the extent possible, acquire all lands and locate and construct, or cause to be constructed, the project and all works and features incidental to its construction in such a manner as to permit the use thereof for the preservation and enhancement of fish and wildlife and for recreational purposes upon completion of the project.

(Added by Stats. 1961, Ch. 867.)

11912. The department, in fixing and establishing prices, rates, and charges for water and power, shall include as a reimbursable cost of any state water project an amount sufficient to repay all costs incurred by the department, directly or by contract with other agencies, for the preservation of fish and wildlife and determined to be allocable to the costs of the project works constructed for the development of such water and power, or either. Costs incurred for the enhancement of fish and wildlife or for the development of public recreation shall not be included in the prices, rates, and charges for water and power, and shall be nonreimbursable costs.

It shall be the duty of the department to report annually to the Legislature the costs, if any, which the department has allocated to recreation and fish and wildlife enhancement for each facility of any state water project. The department shall also report to the Legislature any revisions which the department makes in such allocations.

The department shall submit each such cost allocation to the Department of Parks and Recreation and to the Department of Fish and Game. The Department of Parks and Recreation and the Department of Fish and Game shall file with the Department of Water Resources their written comments with respect to each such cost allocation, which written comments shall be included in the report required by this section.

The allocations or revised allocations reported to the Legislature shall become effective for the purposes of Section 11915 upon approval by the Legislature.

It shall also be the duty of the department to report to the Legislature on any expenditure of funds for acquiring rights-of-way, easements and property pursuant to Section 346 for recreation development associated with such facilities. For the purposes of Section 11915 such expenditures shall become approved in the same manner as provided above with respect to cost allocations.

(Added by Stats. 1966, Ch. 27)

Sec. 3. Section 11913 of said code is amended to read:

11913. The Legislature hereby declares its intent that, except as funds are provided pursuant to Section 11915, there shall be included in the budget for the department for the 1962-1963 fiscal year and each succeeding fiscal year, and in the Budget Act for that fiscal year and each succeeding fiscal year, an appropriation from the General Fund of the funds necessary for enhancement of fish and wildlife and for recreation in connection with state water projects as provided in this chapter.

(Added by Stats. 1966, Ch. 27.)

11914. The department shall make any necessary revisions in the allocation of costs of any state water project works constructed for the development of water and power, or either, which would result from the expenditure of funds under this chapter for enhancement of fish and wildlife and recreation in connection with such works.

(Added by Stats. 1961, Ch. 867)

11915. All moneys deposited in the Central Valley Water Project Construction Fund pursuant to the provisions of Chapter 138, Statutes of 1964, First Extraordinary Session, and all accruals to such moneys

so deposited, are hereby appropriated to the department for expenditure by the department without regard to fiscal years for the purposes of the construction fund, in amounts equal to allocations to recreation and fish and wildlife enhancement and to the costs of acquiring rights-of-way, easements and property for recreation development which have become effective pursuant to Section 11912.

(Added by Stats. 1966, Ch. 27.)

11915.1. The provisions of this chapter shall not limit the department in the financing and construction of any of the facilities of the State Water Resources Development System pursuant to the provisions of Chapter 8 (commencing with Section 12930) of Part 6, nor shall they constitute a limitation on or modification of the responsibility of the department to make allocations of costs provided for in water supply contracts executed pursuant thereto.

(Added by Stats. 1966, Ch. 27.)

11915.5. For the purpose of furthering recreation in any project of the department, the department may exchange any real property it has acquired for property in the state owned by the United States which is of substantially equal value, whether or not such real property of the United States is adjacent to or needed for any project of the department. Such title or rights as the department deems necessary for the proper operation and maintenance of the water conservation, flood control or power features of any water project shall not be included in any exchange consummated under this section.

Any such exchange involving real property acquired by the department solely for recreation shall be concurred in by the Department of Parks and Recreation. Any such exchange involving property acquired by the department solely for fish and wildlife purposes shall be concurred in by the Department of Fish and Game. Any such exchange involving property acquired solely for fish, wildlife and recreational purposes shall be concurred in by the Department of Fish and Game and the Department of Parks and Recreation. Real property of the United States not necessary for a project of the department shall be acquired by the department by exchange under this section only if another agency of state government has agreed to acquire such real property from the department for the actual cost to the department of the real property which is to be given in exchange therefor; provided, that any amount appropriated to the department to reimburse it for prior expenditures for acquisition of such land shall be deducted from the actual cost.

(Added by Stats. 1965, Ch. 1050.)

Article 5. Powers and Duties of the Department of Fish
and Game and the Department of Natural Resources
(Article 5 added by Stats. 1961, Ch. 867)

11917. The Department of Fish and Game shall manage fish and wildlife resources at state water projects, including any such additional resources as are created by such projects, in a manner compatible with the other uses of such projects.

(Added by Stats. 1961, Ch. 867.)

11918. The Department of Parks and Recreation is authorized to design, construct, operate, and maintain public recreation facilities at state water projects. Before commencing the construction of any such facilities, the Department of Parks and Recreation shall submit its plans and designs to the local governmental agencies having jurisdiction over the area involved. The Department of Parks and Recreation shall make every effort to fulfill its responsibilities under this section by entering into contracts with the United States, local public agencies, or other entities, to the end that maximum development of the recreational potential of state water projects shall be realized. The Department of Parks and Recreation shall have the authority to establish and enforce standards for the development, operation, and maintenance of such public recreation areas.

The design, construction, operation, and maintenance of public recreation facilities at state water projects, and the management of project lands and water surfaces for recreational use, shall be subject to the approval of the Department of Water Resources to ensure that they shall not defeat or impair the orderly operation of any state water project for its other authorized purposes and the accomplishment of such purposes.

(Added by Stats. 1961, Ch. 867; amended by Stats. 1965, Ch. 93.)

11919. Public recreation facilities in connection with state water projects are recreational areas.

(Added by Stats. 1961, Ch. 867.)

Article 6. Short Title

(Article 6 added by Stats. 1961, Ch. 867)

11925. This chapter shall be known and may be cited as the "Davis-Dolwig Act."

(Added by Stats. 1961, Ch. 867.)

SENATE JOURNAL

By Senator Farr:

SENATE RESOLUTION NO. 53

Relating to recreation facilities adjacent to the West Side Freeway
in the San Joaquin Valley

WHEREAS, There is a great recreation potential in connection with the proposed West Side Freeway (State Highway Route 238) in the San Joaquin Valley; and

WHEREAS, This recreational opportunity is particularly apparent where the West Side Freeway parallels the aqueduct leading into the San Luis Reservoir; now, therefore, be it

Resolved by the Senate of the State of California, That the Office of Planning in the Department of Finance, the Department of Public Works, the Department of Parks and Recreation, and the Department of Water Resources and the Department of Fish and Game are hereby requested to conduct a joint study under the chairmanship of the administrator of the Resources Agency which will develop a co-ordinated plan for acquisition and development of property for freeway, aqueduct, and recreation uses on the west side of the San Joaquin Valley adjacent to the West Side Freeway, and to submit a report thereon to the Legislature by not later than the fifth calendar day of the 1963 Regular Session; and be it further

Resolved, That the Secretary of the Senate is hereby directed to transmit copies of this resolution to the Office of Planning in the Department of Finance, the Department of Public Works, the Department of Parks and Recreation, and the Department of Water Resources and the Department of Fish and Game.

By Senators Williams, Farr, and Cobey:

SENATE RESOLUTION NO. 54

Relating to water-based recreation facilities in connection
with the California Aqueduct

WHEREAS, The Administrator of the Resources Agency has submitted to the Legislature a report entitled "California's West Side Program" comprising a plan for acquisition and development of property for freeway, aqueduct and recreation uses on the west side of the San Joaquin Valley; and

WHEREAS, The Directors of the Department of Fish and Game, Parks and Recreation, and Public Works, the Deputy Director for Policy of the Department of Water Resources, and the Planning Officer of the State Office of Planning, have affixed their signatures to the report; and

WHEREAS, The report recommends that the Departments of Water Resources, Parks and Recreation, Fish and Game, and the Bureau of Reclamation carefully evaluate the 26 listed water-based recreation potentials for recreation reservoirs, aquatic parks and wildlife areas for ultimate development of those found to be needed and feasible, giving emphasis to the Lost Hills-Tupman-Buena Vista area, the Kettleman City area, the Cottonwood-Poverty Flat area, and angling access to the aqueduct; and

WHEREAS, Such evaluation and development is primarily the responsibility of the Department of Water Resources under the provisions of the Davis-Dolwig Act; and

WHEREAS, Full development of the recreation and fish and wildlife potentials of the California Aqueduct and associated facilities is in the public interest; now, therefore, be it

Resolved by the Senate of the State of California, That the Department of Water Resources is directed, in co-operation with the Department of Fish and Game, the Department of Parks and Recreation, and the United States Bureau of Reclamation, to carefully evaluate the 26 water-based recreation potentials included in the report "California's West Side Program," giving emphasis to the Lost Hills-Tupman-Buena Vista area, the Kettleman City area, the Cottonwood-Poverty Flat area, and angling access to the aqueduct; and be it further

Resolved, That the Department of Water Resources shall report on the desirability, and the engineering and economic feasibility of the 26 water-based potentials, including any it may wish to suggest in addition or as an alternate to the 26 listed, to the Legislature before the fifth legislative day of the 1965 Regular Session; and be it further

Resolved, That the Secretary of the Senate be directed to present copies of this resolution to the Director of the Department of Water Resources, the Director of the Department of Fish and Game, the Director of the Department of Parks and Recreation, and the Administrator of the Resources Agency.

ASSEMBLY CONCURRENT RESOLUTION NO. 54

CHAPTER 109

Assembly Concurrent Resolution No. 54—Relative to recreation areas along the California Aqueduct.

[Filed with Secretary of State June 1, 1965.]

WHEREAS, The Department of Water Resources is required by the Davis-Dolwig Act, after giving full consideration to the recommendations of other interested governmental agencies, to incorporate into the planning and construction of every water project constructed by the state such facilities as are desirable or necessary to permit full utilization of the project for recreational purposes; and

WHEREAS, The California Aqueduct system is a feature of the State Water Facilities which will provide an unparalleled opportunity for development of recreational uses to serve the recreation needs of the state; and

WHEREAS, The Department of Water Resources has transmitted to the Legislature Bulletin No. 154, entitled "Potential Recreation Areas Along the California Aqueduct," which bulletin is an evaluation of the desirability and engineering and economic feasibility of certain water-based potential recreation areas along the California Aqueduct; and

WHEREAS, Bulletin No. 154 recommends that the Department of Water Resources acquire land for recreational development of the following sites: Buena Vista Reservoir, Tupman Aquatic Park, Kettleman City Aquatic Park, Ingram Creek Aquatic Park, and fishing access sites at Wheeler Ridge, Buttonwillow, Lost Hills, Huron, Three Rocks, Ora Loma, and Sperry Road; and

WHEREAS, Bulletin No. 154 further recommends initial recreational development of Buena Vista Reservoir, Kettleman City Aquatic Park, Ingram Creek Aquatic Park, and fishing access sites at Wheeler Ridge, Three Rocks, and Sperry Road and development of the Tupman Aquatic Park site and the sites with fishing access at Buttonwillow, Lost Hills, Huron, and Ora Loma to meet increasing recreation demand as that demand evolves; and

WHEREAS, The Davis-Dolwig Act provides that the nonreimbursable costs of the State Water Project shall be borne by all of the people of the state; now, therefore, be it

Resolved by the Assembly of the State of California, the Senate thereof concurring, That the Director of Water Resources is requested to expedite formulation of plans which will initiate implementation of the recommendations contained in Bulletin No. 154; and be it further

Resolved, That the Director of Water Resources is requested to acquire the recreational sites recommended in Bulletin No. 154; and be it further

Resolved, That the Director of Parks and Recreation is requested to budget for, and to begin, the development of these recreational sites at the appropriate time; and be it further

Resolved, That the Legislature, pursuant to the provisions of the Davis-Dolwig Act, declares its intent that necessary funds shall be appropriated to reimburse the Department of Water Resources for acquisition of recreational use sites and to the Department of Parks and Recreation for development of recreation areas along the California Aqueduct; and be it further

Resolved, That the Chief Clerk of the Assembly transmit a copy of this resolution to the Governor, to the Administrator of the Resources Agency, to the Director of Water Resources, and to the Director of Parks and Recreation.

o

Progress Report to the Legislature

1968 Regular Session

REPORT No. 2

SENATE COMMITTEE ON WATER RESOURCES

STATE WATER PROJECT FINANCING

MEMBERS OF THE COMMITTEE

GORDON COLOGNE, *Chairman*

MERVYN M. DYMALLY, *Vice Chairman*

JOHN L. HARMER

MILTON MARKS *

JAMES R. MILLS

NICHOLAS C. PETRIS *

H. L. RICHARDSON

ALBERT S. RODDA

HOWARD WAY

LOUIS B. ALLEN, JR., *Consultant*

KAY COLEMAN, *Secretary*

* Committee membership terminated January 31, 1968.

James Q. Wedworth appointed January 31, 1968.

James E. Whetmore appointed January 31, 1968.



Published by the
SENATE
OF THE STATE OF CALIFORNIA

HON. ROBERT H. FINCH
President of the Senate

HON. HUGH M. BURNS
President pro Tempore

JOSEPH A. BEEK
Secretary of the Senate

INDEX

	Page
Introduction	5
Conclusions and Recommendations.....	9
Use of Other Funds.....	11
Revenue Bond Financing.....	11
History of State Water Project Financing.....	12
Water Resources Task Force.....	12
Department of Water Resources "Response".....	14
Bulletin No. 132-66.....	18
Additional Financing for the State Water Project.....	20
Appendices:	
I. Summary History of Financing for the State Water Project	29
Increases in Project Costs Since 1960.....	33
Project Expenditures to Date.....	37
Remaining Financing Capability of the Project.....	37
Additional Financing Needs.....	39
Conclusions	41
II. Legislative Counsel's Opinions	
a) Central Valley Project Revenue Bonds.....	45
b) Diversion of Tidelands Oil and Gas Revenues.....	50
c) Use of Bond Offset Funds.....	53
d) Expenditures From the California Water Fund.....	55
III. Peripheral Canal	
a) Letter to William E. Warne, Director of Water Resources from R. J. Pafford, Jr., Regional Director, Region II	59
b) Agreement between the United States and the State of California	66
IV. State Water Project Construction Costs as Proposed June 3, 1960	73
V. Anticipated or Final Contract Cost of Completed and Active Contracts—State Water Project.....	83
VI. Estimated Future Construction Contract Costs—State Water Project	97
VII. Costs as of January 1, 1967—State Water Project.....	105



STATE WATER PROJECT FINANCING

INTRODUCTION

Shortly after assuming office in January of 1967, Governor Reagan appointed the Water Resources Task Force to conduct a review of the state's water development program from a construction standpoint and in terms of the state's capability to complete the planned development within available project funding.

Following appointment of the task force, the Director of Water Resources requested that the task force give particular attention to the question of project financing. He specifically asked that the task force:

"1. Review and evaluate the department's estimate of funds required to complete the project. For this purpose include the Davis-Grunsky local assistance program, costs of the Upper Eel River Investigation, the state's share of the proposed joint State-Federal Peripheral Canal, the San Joaquin Master Drain and any other facilities set forth in the Burns-Porter Act.

"2. Review and evaluate the differences in costs between the project facilities as originally planned and as now being built and planned.

"3. Review and evaluate the present program for financing the State Water Project. If you should forecast any deficiencies, recommend means of meeting them.

"4. Review and evaluate the department's timetable for construction of the project."¹

The Water Resources Task Force completed its work and filed its final report in May of 1967. While the report covered a broad range of subjects, including project construction, water supply and demand, project operation, contract administration, department organization, and recreation, the most important and fundamental task force finding was that additional financing was required in order to assure completion of the State Water Project.

The task force reported that the project had a financing deficiency of \$300 million in the short-term and a potential long-term shortage which could possibly approach \$600 million. It should be noted, however, that in making this finding the task force recognized that the actual amount of the long-term funding deficiency could not finally be determined until such time as a number of policy decisions were made.

The task force also recognized that its findings were not conclusive and recommended that:

"The department should initiate an immediate detailed re-examination of project financing to determine within precise range both the short-term and long-term financing deficiencies. Such studies should take into consideration alternative assumptions,

¹ Transcript of Proceedings, Senate Committee on Water Resources and Assembly Committee on Water, October 17-18, 1967, p. 10.

including deferment or scaling down of project features not required at this time to make initial deliveries of water on schedule, and various financing arrangements. Once such deficiencies have been determined, studies should be undertaken to lay out alternative courses of action to complete project financing and construction in time to meet scheduled water deliveries and other commitments.

"The results of the above recommended studies should be made available to the Governor, the Legislature and the public as soon as possible so that informed decisions can be made and action taken at an early date in the best interests of the entire state."²

In accordance with this recommendation, the Director of Water Resources appointed a special committee composed of high-level departmental officials to evaluate the data contained in the task force report, to refine project cost data, and to present proposals for project construction and financing.

This committee worked through the summer of 1967 and submitted its report entitled "Alternatives for State Water Project Construction and Financing Through 1975" in September. The department used the 1975 date for purposes of their analysis primarily because of the many uncertainties remaining in the project which served to make the development of accurate long-range projections impossible at the present time. Additionally, in the department's judgment, there was no particular urgency in projecting costs beyond that time.

The department's report presented three cases of construction alternatives for the remaining project facilities. It should be noted, however, that numerous cases or alternatives are possible in such analyses depending upon the availability of funding and the goals desired to be achieved. The three cases presented by the department, summarized briefly, are as follows:

Case I. This alternative contemplates proceeding with the project construction schedule set forth in Department of Water Resources Bulletin No. 132-67 and would provide for the early completion of all proposed project facilities. The department estimated that proceeding with this schedule would exhaust all available funding in 1971. This schedule would require \$51 million in additional capital through 1972 and \$77.5 million through 1975 without taking into consideration revised cost data for certain of the project units.

Case II. The construction alternatives set forth in Case II are described as a "minimum deferment" schedule and would require the deferment or staging of certain specified project facilities. Proceeding with the construction schedule set forth in this alternative would also exhaust all available funding in 1971. This schedule would require approximately \$21.5 million additional capital through 1972 and \$39 million through 1975 but takes into consideration more up-to-date cost data.

Case III. The construction program set forth in this case was described as a "maximum deferment" schedule and contemplates the deferral of *all* project facilities which are not necessary to meet contracted water delivery schedules. If this schedule were adopted sufficient capital would be available to meet capital funding requirements

² Report of the Water Resources Task Force on the State Water Project, May 1967, p. 4.

through 1975 and maintain a surplus of about \$65.8 million. It should be noted, however, that additional funding would be required to complete construction of the postponed facilities after that date.

The department's findings, as contained in their response to the task force report, were transmitted to the California Water Commission for their consideration. The Water Commission and the department then conducted hearings in order to publicly analyze the content of the department's report and to formulate a positive course of action prior to joint hearings which had been scheduled for mid-October by this committee and the Assembly Committee on Water.

The commission felt that there was no doubt but that a serious funding deficiency existed and concluded that the department had no alternate but to defer construction on a portion of the facilities pending the provision of additional financing.

Accordingly, the commission formulated guidelines to assist the department in determining construction priorities within the remaining available funding. These guidelines, summarized briefly, are as follows:

1. The commission, logically, gave first priority to the completion of those facilities which are essential to achieve the delivery of water to state project contractors in accordance with the provisions of the several water delivery contracts. Such facilities included aqueducts, pumping plants, and tunnels which are necessary to achieve water delivery.

2. The commission placed second priority upon the construction of revenue-producing facilities which would either reduce the cost of water to contracting agencies or provide revenues for the project.

3. The third priority was given to those facilities which are desirable to the operation of the project and which, while not now necessary, will ultimately be required to assure its reliability and efficient functioning.

4. The last priority, in the judgment of the commission, was for the construction of facilities which are desirable but have no effect upon water deliveries or project operating efficiency. Such facilities include those project features to be constructed for recreation and/or fish and wildlife enhancement purposes.

The Director of Water Resources following the commission hearings and prior to the hearings conducted by the joint committees announced, in accordance with commission guidelines, that it was his intention to defer construction on all facilities not necessary to assure the delivery of water on schedule in accordance with the provisions of the department's water delivery contracts. This contemplated deferment pursuant to the department's Case III with the exception of the Santa Ana Valley pipeline which was restored under priority I due to the fact that the Metropolitan Water District could not adjust its construction schedules to provide for early completion of a parallel pipeline previously scheduled for the 1980's. Both pipelines, however, will ultimately be necessary to meet maximum water delivery requirements to the district's member agencies.

The project facilities identified to be deferred or adjusted are as follows:

1. Abbey Bridge Dam and Reservoir.
2. Dixie Refuge Dam and Reservoir.
3. North Bay Aqueduct, right-of-way for second stage.
4. Cottonwood Powerplant.
5. Buttes Dam and Reservoir.
6. Pearlblossom Pumping Plant, two units.
7. Devil's Canyon Powerplant.
8. Perris Dam and Reservoir.
9. California Aqueduct, Oso Pumping Plant to Pyramid Powerplant.
10. Pyramid Powerplant.
11. The Coastal Branch.
12. The Peripheral Canal.
13. San Joaquin Valley Drain.
14. Upper Eel River Development.
15. San Luis Canal Augmentation.

The hearings by the joint legislative committees were conducted primarily to explore the reasons for the projected financing deficiency, to determine what the department was doing within existing authorizations to ease the magnitude of any projected deficiency, and to determine what recommendations the department had to provide additional funding to assure the completion of all required project facilities as previously scheduled.

To our disappointment, the department failed to recommend any specific means of providing additional funding and appeared somewhat negative in the pursuit of funding possibilities which might be available to them within existing authorizations. (These are discussed in detail elsewhere in this report.) The department's failure in this regard served to preclude the immediate achievement of the goals sought by the Water Resources Task Force. The department's "Alternatives for State Water Project Construction and Financing" was, in actuality, no more than alternatives for construction. For all practical purposes, it ignored financing. While the department felt that the provision of additional funding was the province of the Legislature, they certainly must have recognized that it is the province of the Department of Water Resources to offer leadership in this area.

Following the joint committee hearings a series of meetings were held with representatives of the Departments of Finance and Water Resources, the Resources Agency, and the Governor's office in an attempt to develop a program to provide supplemental financing for the project.

Subsequent to these meetings, Governor Reagan announced a proposal to provide additional financing to resolve the projects short-term funding problem. This proposal, which is discussed in detail later in this report, required the enactment of legislation and would make an additional \$64 million available through 1972.

This legislation has been introduced (Senate Bill 11—Cologne and Assembly Bill 15—Porter) and is currently pending before the Legislature. The passage of this legislation will enable the department to

return to previously established construction schedules and will permit the completion of all project units essentially in accordance with original timetables.

The short-term deficit of \$300 million projected by the task force for 1975, it is noted, was determined to be no more than \$77.5 million by the department, even under a schedule contemplating the construction of *all* planned facilities as previously scheduled.

CONCLUSIONS AND RECOMMENDATIONS

There appears to be little doubt that the State Water Project has a funding deficiency and that additional capital must be made available if *all* of the proposed project facilities are to be constructed on schedule. It is noted that no provision was made for construction cost escalation in the original financing of the project. Such escalation, together with numerous other factors, including changes in and enlargement of facilities, has served to increase costs over those originally contemplated. We believe that the state has a moral and legal obligation to complete the State Water Facilities as they were promised to the voters when they approved the Burns-Porter Act. We also believe it to be the obligation of the Legislature to provide such additional funding as may be necessary to assure the attainment of that goal for it has been the Legislature itself that has changed the laws governing the flow of tideland oil funds to the project.

We, therefore, endorse and recommend for passage by the Legislature the water project funding proposals previously advanced by the Governor. We believe, however, that the provision of an additional \$14 million annually should be continued indefinitely rather than for a three-year period as proposed. Present projections of capital funding requirements indicate that if this is done sufficient funds *may* be available to construct all of the proposed facilities through 1985 thereby eliminating the necessity of another water bond proposal in the immediate future.

The provision of additional tidelands oil revenues for the water project is, in the judgment of this committee, clearly justified. At the time the Burns-Porter Act was passed by the Legislature and approved by the people it was promised that the major portion of all tidelands oil and gas revenues accruing to the state would be devoted to achieving the completion of the State Water Resources Development System. It was upon this proposition that the system was planned.

That promise, however, did not last very long and the majority of such revenues were subsequently diverted to other uses leaving the water project with only \$11 million annually. If the State of California had abided by its promise to the people, we would not be facing a project funding deficiency at this time nor would we be faced with such an eventuality in the foreseeable future. It is, therefore, only logical to this committee that we return in part to our original commitment to the people and provide additional tidelands oil and gas revenues for water development. If a subsequent bond issue is ultimately required, its success would at best be doubtful unless we have kept faith with the people on the commitments made when the original issue was presented.

The justification for "removal" or "avoidance" of the bond offset requirements of the Burns-Porter Act may not be so clear as is the provision of additional tidelands oil and gas revenues. The Burns-Porter Act contemplated that to the extent funds were expended from the California Water Fund for the construction of the State Water Facilities an equal amount of Burns-Porter bonds would be set aside or reserved for the construction of additional facilities in the watersheds of the Sacramento, Eel, Trinity, Mad, Van Duzen, and Klamath Rivers to meet local needs and to augment supplies in the Sacramento-San Joaquin Delta.³

It must be kept in mind that the Burns-Porter Act was approved by the people and cannot be changed by the Legislature without their approval. It is clear that the intent of that Act was to reserve funds for the construction of additional projects. It is our belief that the use of any funds which would otherwise offset bonds must be replaced in order to keep faith with the people.

This is a fundamental reason for our recommending the provision of additional funding beyond the project's short-term financing requirements. The provision of an additional \$14 million annually in perpetuity for project construction will not only meet our short-term requirements but will make available many additional millions of dollars to help assure the completion of the additional project facilities as well. On this basis we believe the avoidance of the bond offset requirements to be justified. In considering this proposal it should be kept in mind that the Legislature has the authority to annually appropriate money in the California Water Fund for any other purpose and has done so on several occasions.

In discussing bond offset, two additional factors must also be kept in mind. First, is that the bond offset requirements will cease to be operative when Burns-Porter bonds are exhausted. It is now estimated that this event will occur sometime in 1970. Therefore, by enacting the proposed legislation, we would be "avoiding" this requirement only for a maximum period of about two years.

Secondly, the Department of Water Resources has signed a memorandum of understanding with the Corps of Engineers whereby the corps will construct the Dos Rios Reservoir on the Middle Fork of the Eel River, which was previously adopted as the first additional unit of the State Water Project, and the department is obligated to construct the Dos Rios-Grindstone Tunnel to convey water to the Sacramento-San Joaquin Delta. It is estimated that the funds presently accumulated under the bond offset provisions of the Burns-Porter Act will be adequate to complete this obligation.

It is noted in this regard that the state would be financially unable to complete even this first additional facility on the north coast were it not for the proposed joint construction of the Dos Rios Reservoir complex and conveyance facilities.

³ Water Code Section 12934.

Use of Other Funds

Significant sums of California Water Fund money are currently encumbered which could otherwise contribute materially to the construction of the State Water Facilities. Nearly \$14 million is presently dedicated to the provision of a state guarantee to the federal government of local financial participation for the Black Butte and New Hogan Dam projects.

The committee feels, as did the Water Resources Task Force, that "the department should exert every effort to obtain federal legislation incorporating these reservoirs into the federal Central Valley Project, which would free these badly needed funds."⁴

In the absence of such incorporation, the department, pursuant to appropriate legislation, should seek an amendment to its contract with the federal government whereby the state's obligation could be carried out through an annual budget item and legislative appropriation.

Revenue Bond Financing

Revenue bonds, while not necessarily the most desirable type of financing from an interest rate standpoint, do present one means by which the department is able to assist in resolving the project's financing problem within its existing statutory authorization.

In general, revenue bonds may be issued by the department pursuant to the Central Valley Project Act (Water Code Section 11100 et seq.) to finance revenue producing facilities with the amount of such bonds which may be issued being determined by the revenue which will be produced from the completed facility.

The department proposed the issuance of such bonds to finance the Oroville-Thermalito power complex and their right to utilize this type of financing was upheld in the case of *Warne v. Harkness*.⁵ We believe that, while the circumstances are somewhat different, such a bond issue, if necessary to assure the completion of the project, should also be pursued in regard to the power recovery plants southerly of the Tehachapi crossing. The Legislative Counsel, it is noted, supports the legal validity of this position. (See appendix.)

We believe, of course, that if an arrangement can be worked out whereby a private or public utility would construct such facilities that this certainly offers what appears to be a much better approach. In the event this cannot be achieved, however, it is our recommendation that the department proceed to obtain the necessary approvals for the issuance of Central Valley Project revenue bonds to finance these plants under a plan whereby the state purchases the power for its own pumping purposes.

The department in the past has been quite negative in regard to this proposal which was previously advanced by this committee. Their principal argument in opposition to such a proposal is that it would require a court test which would be time consuming.

We note that the requirement of a court test in no way limited or restrained the department in seeking approval for the issuance of

⁴ Report of the Water Resources Task Force, *op. cit.*, p. 7.

⁵ 60 Cal.2d 579.

revenue bonds based upon the production of Oroville-Thermalito power. We see no reason why it should restrain them in regard to the power recovery plants. In fact, we feel that the department has an undeniable duty to pursue such a course, if that be necessary, to assure the timely completion of these facilities since the value of the power they produce will serve to reduce the cost of water by two to three dollars per acre-foot.

In conclusion, we recommend that the department, supported by whatever legislative enactments may be required, make every effort to complete all of the State Water Project units on schedule as planned and fulfill the commitment we have made to the people of California.

HISTORY OF STATE WATER PROJECT FINANCING

A summary history of financing for the State Water Project was written by William L. Berry, Sr., then engineer for the California Water Commission, and was published as Appendix B of the Water Resources Task Force Report. While we may not necessarily agree with all of the conclusions drawn in the summary, it nevertheless presents what we believe to be an excellent résumé of the project's financial history, including the many factors which have served to increase costs thereby creating our present financial difficulties. This history lays a proper foundation for the conclusions and recommendations reached by this committee and is incorporated here by reference. It is reproduced verbatim in the appendix of this report.

WATER RESOURCES TASK FORCE

As mentioned in the introduction to this report, the Water Resources Task Force found "that there is a short-term financing deficiency of up to \$300 million, and a long-term deficiency of up to \$600 million"⁶ in the financing of the State Water Project.

While there can be little doubt but that a project funding deficiency exists, the task force report, however, fails to substantiate any financing deficiency of the magnitude stated therein. By utilizing exceedingly pessimistic assumptions, the task force reported that a maximum short-term deficiency of \$260 million could be forecast. The task force, however, chose to "round" this figure to \$300 million for the sake of simplicity. We do not believe that \$40 million should be treated so lightly. The task force forecast of a \$260 million deficiency, as evidenced by the data contained in the department's response, likewise, is not necessarily a very realistic figure.

While the task force at that time could not have been aware of the additional \$40 million in revenue bonding capacity which would become available through the negotiation of a more favorable contract for the power produced by the Oroville-Thermalito facilities, they must have been aware of the fact that the \$210 million in such bonding capacity utilized in their analysis was a rock bottom figure based upon the best offer from the private utilities as of that time. Certainly it must have been obvious that a more favorable agreement would be forthcoming as negotiations were still taking place.

⁶ Water Resources Task Force, *op. cit.*, p. 17.

Likewise, the task force chose to add \$100 million to the estimated cost of the Peripheral Canal for purposes of their analysis thereby bringing the total estimated capital outlay for that facility to \$155 million. The basis for this increase is that the Peripheral Canal may have to be constructed initially by the state without federal financial participation. Certainly this is a possibility. The state's cost, however, would be substantially less if the state were to construct this facility solely for purposes of the State Water Project than it would for a larger facility to accommodate both the state's needs and those of the Bureau of Reclamation.

It should be kept in mind that the Bureau of Reclamation's preliminary feasibility report on a joint Federal-State Peripheral Canal assigned state costs of about \$55 million. This was the basis upon which the proposed agreement, as outlined in the bureau's letter, was being formulated. It is recognized, however, that in the final project feasibility report the actual ultimate state share of the cost for a joint facility will exceed this figure by some measure. It is, however, extremely unlikely that such costs would approach \$155 million.

If basic assumptions were again changed to provide for state construction of a joint use facility with federal reimbursement, the initial outlay by the state conceivably could approach this figure. It must be recognized, however, that this is initial outlay and not the state's share of the total project cost.

As a practical matter, it is extremely unlikely that a peripheral canal will be constructed solely to serve the purposes of the State Water Project as the construction of this facility on such a basis could create difficult operational problems for the bureau's Central Valley Project.

The diversion of large amounts of water through a state peripheral canal would place the burden on the Bureau of Reclamation to release an increasing amount of water from storage reservoirs in order to maintain suitable water quality at their Tracy Pumping Plant. In short, there appears to be no practical alternative to the construction of a joint state-federal facility.

One additional factor should be mentioned regarding the task force analysis of our short-term funding requirements. That is the data they have included for the San Joaquin Valley Drainage Facility.

The task force has correctly pointed out that the \$43 million cost figure for the San Joaquin Valley Drain is extremely unrealistic. Best estimates indicate that this facility will most likely exceed \$100 million in cost.

We believe, however, that the inclusion of any cost estimate for this facility in a forecast of our immediately impending financial requirements is in and of itself unrealistic inasmuch as the Director of Water Resources had previously announced that the construction of this project facility was to be deferred until such time as repayment contracts were forthcoming from the drains beneficiaries. It now appears extremely unlikely that construction will occur before 1985.

Such uncertainties without doubt make it impossible to forecast precisely or even with any reasonable degree of accuracy what our long-range financial requirements might be. Certainly, any number of as yet unforeseen factors could possibly increase our ultimate additional fund-

ing requirements to the \$600 million figure or beyond. We do not, however, believe it appropriate to draw such conclusions at this time.

To conclude this as fact at the present time is unrealistic and serves to create a false impression that the project is facing a more serious funding deficiency than that which may actually exist. The simple fact of the matter is that at this point in time we do not know. As we have previously pointed out, the additional financing provided by SB 11 and AB 15 might well be sufficient to meet all of our capital requirements for the long term but we would hasten to add, however, that to draw definite conclusions at this time is sheer folly.

DEPARTMENT OF WATER RESOURCES "RESPONSE"

While the Department of Water Resources response to the Water Resources Task Force is considered by some as not being responsive to the task force report, it does nevertheless set forth within minimum and maximum limits the construction alternatives which are available within our existing financial resources should additional funding not be made available.

It should be recognized at the outset that an almost infinite number of alternatives are available within these limits depending upon yet undetermined factors. The committee, however, tends to agree that the response was not completely responsive and points out that there are a number of inconsistencies in the department's report.

The department has presented three possible cases in response to the findings of the Water Resources Task Force. The basic problem with this comparison is that the bases for analysis utilized in each of the three cases are not constant thereby making analysis difficult and comparison impossible.

TABLE 1
SUMMARY OF FINANCIAL ANALYSES
(in millions of dollars)

Case	Description	Year funds exhausted	Status of funds	
			1972	1975
	Task force report -----	1970	—\$300	*
I	Bulletin 132-67 -----	1971	—\$ 51	—\$77.5
II	Minimum deferment -----	1971	—\$ 21.5	—\$39.0
III	Maximum deferment -----	after 1975	+\$ 96.9	+\$65.8

* Task force estimate not available for this date.

These differences, several of which were pointed out by the Metropolitan Water District at the joint committee hearings, are discussed briefly for the information of the reader.

First, the Buttes Dam and Reservoir with costs of \$1,884,000 through 1975 was included in Cases II and III but not in Case I, which was composed of cost data contained in Department of Water Resources Bulletin 132-67. The department is obligated to conduct a feasibility study by contract with the Antelope Valley-East Kern Water Agency and, if the dam is found feasible, to construct the reservoir.

Second, the cost of the Peripheral Canal was estimated at \$45.9 million for purposes of Case I. In Cases II and III \$55.5 million was added to the estimated cost of this facility making the future estimated outlay \$101.4 million from 1968 through 1975. The department readily

admits that this is strictly an arbitrary figure. It is, however, a more realistic one in relation to the actual ultimate state share of the cost of the facility. Because of uncertainties, however, the precise cost to the state cannot be determined at this time.

Third, in Cases I and II cost estimates were based upon the construction of Perris Reservoir to an initial capacity of 100,000 acre feet. In Case III it was assumed that the Perris Reservoir would be constructed to an initial capacity of 500,000 acre feet. The Metropolitan Water District pointed out that a maximum capacity of 200,000 to 300,000 acre feet is the most that would be required for the initial stage of construction if Perris Reservoir were built prior to 1980. They further point out that if cost data for a 100,000 acre foot Perris Reservoir were used as the basis of analysis in Case III, as it was in Cases I and II, the Case III surplus in 1975 depending upon the length of the construction period would be \$76.6 million rather than \$65.8 million as estimated by the department. It should be noted, however, provision has been made for increasing the size of Perris Reservoir at a later date consistent with water delivery requirements from the reservoir. The Metropolitan Water District has advanced funds to acquire necessary lands and construct the initial dam embankment to accommodate the development of a larger capacity reservoir. Metropolitan would also advance whatever funds are necessary to raise the height of the dam embankment.

Fourth, the San Joaquin Valley Drain was included in Case I with estimated capital expenditures of \$34.6 million between 1968 and 1975 but was deferred until after 1975 in the Case II and Case III analysis. It is noted that this amount probably would not be sufficient to complete the construction of this facility.

Fifth, and perhaps one of the most important omissions in the department's analysis is that the additional \$40 million in revenue bonding capacity made available as a result of the Oroville-Thermalito power contract was utilized in computing the estimated surplus or deficit in Cases II and III but was *not* utilized in computing the estimated Case I financing deficiency.

Tables 2 and 3 give the correct picture of annual and total capital costs of the State Water Facilities. Table 2 is Case I, as presented in the department's "Response to the Water Resources Task Force" (Bulletin 132-67), modified to reflect assumption changes, revised cost estimates, and changes in construction scheduling which would have been necessary regardless of whether or not the Water Project faced a funding deficiency. Table 3 then modifies the data contained in Table 2 to indicate the effect of a "minimum deferment" schedule (Case II) upon the construction program.

In examining the department's response, it is most important to recognize that the deferral of certain of the proposed project facilities will not only result in the necessity of providing additional capital funding for such facilities at a later date but also that the total capital cost of the deferred facilities will increase because of the deferral. Thus, the total cost of the State Water Facilities are also increased.

TABLE 2
ANNUAL CAPITAL COSTS OF STATE WATER FACILITIES
Case I updated to Case IA
(in millions of dollars)

Year	Case II: Bulletin 132-67	Rescheduled Facilities								Case IA: Bulletin 132-67 modified		
		Peripheral Canal ²		San Luis Canal Augmentation ³		Buttes Dam and Reservoir ⁴		Cottonwood Powerplant ⁵			Pearblossom Pumping Plant ⁶	
		132-67	Updated	132-67	Updated	132-67	Updated	132-67	Updated		132-67	Updated
Through 1967	1,178	(-)	(+)	(-)	(+)	(-)	(+)	(-)	(+)	(-)	(+)	1,178
1968	341	9	9	--	--	--	--	1	1	3	3	339
69	362	2	1	--	--	--	--	2	1	1	1	361
70	213	2	4	--	--	--	--	4	2	12	11	216
71	112	1	5	--	--	--	--	1	1	8	7	107
72	51	5	2	--	--	--	--	1	--	4	3	50
73	42	11	10	--	--	--	--	--	--	1	1	54
74	24	12	24	--	--	--	--	--	--	--	--	51
75	37	13	27	--	--	--	--	--	--	--	--	58
76	27	--	28	--	--	--	--	2	--	--	--	26
77	24	--	--	--	--	--	1	--	--	--	1	36
78	17	--	--	--	--	--	9	--	1	--	--	27
79	17	--	--	--	--	--	--	--	--	--	--	19
1980	3	--	--	--	--	--	--	--	2	--	--	5
81	--	--	--	--	--	--	--	--	--	--	--	--
82	2	--	--	--	--	--	--	--	--	--	--	--
83	4	--	--	--	--	--	--	--	--	--	--	--
84	8	--	--	--	1	--	--	--	--	--	--	--
1985	6	--	--	--	9	--	--	--	--	--	--	--
Totals	2,470 ^a	55	110	20	15	--	21	9	10	29	29	2,512

¹ Represents cost program as of July 1967.

² State's share increased to \$110 million operational in 1976.

³ Construction of additional lining to enlarge the San Luis Canal.

⁴ Construction of Buttes Dam and reservoir was not included in Bulletin 132-67.

⁵ Energy dissipator installed and generator deferred.

⁶ Two pumping units deferred until needed.

⁷ Bulletin 132-67 cost program modified to reflect adjustments that would have been made in any event due to continuing engineering studies.

⁸ State Water Facilities only—excludes costs of the Upper Eel River Development.

TABLE 3
ANNUAL CAPITAL COSTS OF STATE WATER FACILITIES
Case IA Modified to Case II
(in millions of dollars)

Year	Case IA ¹ Bulletin 132-67 Modified	Rescheduled Facilities										Case II: Minimum Deferment Schedule
		Dixie Refuge ² Dam and Reservoir		Abbey Bridge ³ Dam and Reservoir		North Bay ⁴ Aqueduct		Coastals ⁵ Aqueduct		San Joaquin ⁶ Drainage Facilities		
		132-67	Updated	132-67	Updated	132-67	Updated	132-67	Updated	132-67	Updated	
		(-)	(+)	(-)	(+)	(-)	(+)	(-)	(+)	(-)	(+)	
Throughout 1967	1,178	0.2	0.2	0.6	(+)	(-)	(+)	(-)	(+)	(-)	(+)	1,178
1968	339	0.06	---	---	---	0.4	---	---	---	---	---	335
69	361	0.3	---	1.8	---	0.3	---	---	---	---	---	358
1970	216	0.6	---	2.3	---	0.2	---	---	---	1	---	215
71	107	0.6	---	0.06	---	0.2	---	---	---	---	---	104
72	50	2.4	---	0.01	---	0.1	---	---	---	1	---	47
73	54	0.7	---	---	---	---	---	---	---	2	---	43
74	51	---	---	---	---	---	---	---	---	---	---	39
75	53	---	---	---	---	---	---	---	---	1	---	44
76	26	---	---	---	---	0.1	0.1	---	---	3	1	19
77	36	---	---	---	0.5	0.5	1.6	---	---	9	1	24
78	27	---	---	---	2.2	0.5	1.1	---	---	15	1	19
79	19	---	0.4	---	3.0	1.3	1.5	---	---	14	3	18
1980	5	---	0.5	---	---	3.9	3.9	---	---	12	10	23
81	---	---	3.0	---	---	0.2	0.2	---	---	2	17	14
82	---	---	0.8	---	---	---	---	---	---	---	---	11
83	---	---	---	---	---	---	---	---	---	---	---	3
84	1	---	---	---	---	---	---	---	---	---	---	9
85	5	---	---	---	---	---	---	---	---	---	---	5
Totals	2,542	4.3	4.9	4.8	5.7	7.7	8.4	59	66	36	---	2,516

¹ Bulletin 132-67 modified to reflect adjustments that would have been made in any event due to continuing engineering studies.

² Project deferred until the late 1970's.

³ Project deferred until the early 1980's.

⁴ Rights-of-way purchases deferred until mid-1970's.

⁵ Completion of the Coastal Aqueduct deferred.

⁶ Initial deliveries rescheduled to 1983.

⁷ Costs of a San Joaquin drainage facility deferred after 1967 due to the project uncertainties. About \$7 million has been expended for the Drain through 1967.

⁸ "Minimum Deferral" program shown as Case II through 1975 in Volume I of the Department's "Response," excluding future costs for constructing a San Joaquin drainage facility.

If construction of the State Water Facilities were deferred as suggested in Case III, the adverse effect of such deferral would be a net increase of \$70 million in the project's post-1975 capital funding requirements. According to the department, this increase would be due to the following:

1. Increased costs due to construction of interim works required for operation during the deferral period and to construction price escalation -----	\$22 million
2. Increased reservation of general obligation bonds for the construction of "additional facilities" caused by a two-year extension of the effectiveness of the "offset" provision of the Burns-Porter Act -----	22 million *
3. Increased use of "miscellaneous receipts" for coverage of general obligation bond service, due to the deferral of project revenues caused, in turn, by the deferral of reimbursable construction costs -----	16 million
4. Temporary loss of the use of "miscellaneous receipts" due to the extended reservation for possible future bond service requirements until after 1975 -----	10 million *
TOTAL increased funding requirement due to construction deferrals -----	\$70 million

*Note that these increased funding requirements apply only to the particular facilities considered in the analysis during the period through 1975 and do not represent an overall increase in funding requirements for the entire project.

Therefore, not only would it be necessary after 1975 to fund the present estimated cost of the deferred facilities but it would also be necessary to provide an additional \$70 million because of the above mentioned factors. We believe the most economical course of action is to provide immediate additional financing and thus avoid necessity of providing an additional \$70 million to complete these facilities at a later date.

BULLETIN NO. 132-66

During the joint committee hearings on project financing, it was brought to the attention of the committee that the Department of Water Resources' financial advisor recognized as early as March of 1966 that the project was facing serious funding problems. At the hearing, he stated that the assumptions used in the annual project financial analysis had been modified for purposes of the publication of Bulletin 132-66 in order to reflect a small surplus in project financing.

Whether or not the previous administration ordered such modifications in order to minimize the seriousness of the project's financial condition is a matter of conjecture. In any event, these were political decisions which were made at a high level within government and should not in any way reflect upon the quality or professional integrity of staff people within that government.

Certainly it must be recognized that the preparation of an annual financial analysis, such as the department's Bulletin 132 series, requires the use of certain assumptions which in the final analysis may or may not prove valid. This differs significantly from an intentional falsification of data to reflect a condition which one knows to be untrue.

The department, in preparing its financial analyses is, of necessity, required to make certain assumptions. Assumptions which may be based upon highly nebulous occurrences such as the future authorization of a

project by the federal government, may take into account anticipated future reimbursements or other factors which may never materialize. In any event, however, we believe there should be some reasonable assurance that when major assumptions are made or changes effected, there is substantial support for such changes from high level authority.

Summarized below and in Table 1 are the changes in assumptions made in Bulletin 132-66, the basis for such changes, and their fiscal effect upon the project analysis. These changes are explained in detail in Table 12 of Bulletin 132-66 entitled "General Reconciliation of Capital Cost Changes."

The principal change between Bulletins 132-65 and 132-66 involve two assumption changes in regard to the Delta facilities which resulted in a reduction in the state's capital outlay requirements of some \$99.1 million. Bulletin 132-65 assumed the construction of joint federal-state facilities to transport water around the Delta by the State of California with the Bureau of Reclamation reimbursing the state for its share of the capital costs. Bulletin 132-66 reversed this assumption by assuming federal construction with state reimbursement. While this does not affect the net state cost, the initial outlay of state funds is reduced. This decrease is offset, however, by a corresponding reduction in federal contributions which are accounted for by the department as "miscellaneous receipts."

This change, as was the change regarding the state's share of the capital costs, was supported by a letter from the Bureau of Reclamation outlining a proposed agreement regarding the construction of the Peripheral Canal. This letter was intended to serve as the basis for a formal agreement between the department and the Bureau. It is noted that this proposal has never been finalized although an agreement to advance state funds was executed on November 16, 1966. Even this agreement, however, never became effective because the State Department of General Services refused to approve it. (Both of these documents are reproduced in the appendix of this report.) While these changes were ostensibly supported by a letter from the bureau, we believe a more formal understanding between the parties should be effected before major policy assumptions are altered.

The second decrease in the amount of \$49.7 million was effected by deleting project features which were reflected in previous editions of Bulletin 132. In this instance, the second and third stages of the San Joaquin Master Drain were omitted entirely. It is noted in this regard that in early 1967 the Director of Water Resources announced that the department was also abandoning plans for the early construction of the first stage of the San Joaquin Master Drain due to the fact that the department was unable to negotiate contracts with potential beneficiaries which would assure to the state repayment of all of the capital

TABLE 4

Item	Change in total estimated capital costs, in millions of dollars	
	Increase	Decrease
<i>Change in bases for reflecting the estimated costs of the Delta Facilities:</i>		
1. Assumed construction of the facilities by the Bureau of Reclamation, with the state contributing its share of costs, rather than vice versa.....		\$70.7 ^a
2. Assumed state's share of costs as shown in the bureau's letter dated December 20, 1965, rather than the "nonfederal" share shown in the Interagency Delta Committee Report....		28.4
Subtotal.....		99.1
<i>Cost of features not fully reflected in previous bulletins:</i>		
1. Monitor and control system.....	\$30.0	
2. Clifton Court Forebay.....	10.3	
3. Access roads (Upper Feather Area).....	1.3	
Subtotal.....	\$41.6	
<i>Cost of features previously reflected but deleted in this bulletin:</i>		
1. Second and third stages, San Joaquin Master Drain.....		\$49.7
<i>Change in estimated costs for remaining facilities and features of the project:</i>		
1. Surveys and engineering studies.....	\$5.3	
2. Rights-of-way acquisitions.....	33.0	
3. Design and construction.....	30.1	
4. Preoperating expense.....	10.0	
Subtotal.....	\$78.4	
TOTAL CHANGE, Bulletin No. 132-65 to Bulletin No. 132-66:.....		\$28.8

^a The net costs to the state are unaffected by this change. Federal contributions decrease a corresponding amount and offset the reduction in the project's capital costs. Federal contributions are included in the category of "miscellaneous receipts", which can either be applied directly to reduce capital expenditures by the state or to payments on water bond service.

costs of this facility. This appears, in our judgment, to be justified as the construction of project facilities in the absence of repayment assurances could jeopardize the financial stability of the project.

The remaining changes in Bulletin 132-66 increased project costs for certain works by \$120 million resulting in a net decrease in total estimated capital costs of \$28.8 million. Increased costs for the monitor and control system, the Clifton Court Forebay, and access roads in the Upper Feather River area accounted for \$41.6 million of this increase. Increased costs for surveys and engineering studies, rights-of-way acquisition, design and construction, and preoperating expense on the remaining project features accounted for \$78.4 million or the remainder of the increase.

ADDITIONAL FINANCING FOR THE STATE WATER PROJECT

The necessity of providing additional financing for the State Water Project should be abundantly clear to all who are familiar with its planning and development. We know that we need at least \$78 million in additional funding capability to assure the maintenance of established construction schedules through 1975.

The question which faces those responsible for securing the completion of the project is, of course, how much more do we need after that time to assure the completion of all planned facilities?

There is, however, no specific answer to this question at the present time. While the department has been able to identify the project's

TABLE 5
(Table 12 from DWR Bulletin 132-66)
GENERAL RECONCILIATION OF CAPITAL COST CHANGES
(in millions of dollars)

			Costs of additional features		Changes in costs items					
Project facilities	Bulletin No. 132-65	Bulletin No. 132-66	Change	Feature ¹	Cost	Advanced plan- ning ²	Design and construction ³		Right of way ⁴	Pre-oper- ating ⁵
							Feature	Change		
UPPER FEATHER AREA:										
Frenchman Dam and Lake.....	3.3	3.2	-0.1				Dam.....	(+0.5)	+0.5	-0.1
Grizzly Valley Dam & Lake Davis.....	3.8	4.1	+0.3				Dam.....	(+0.3)		-0.4
Antelope Dam and Lake.....	4.3	4.5	+0.2		+1.3		Road Relocations.....	(+0.5)		+0.2
Dixie Refuge Dam and reservoir.....	2.1	4.7	+2.6	Access Road.....			Construction Supervision.....	(+0.5)	+1.3	
Abbey Bridge Dam and reservoir.....	4.4	5.3	+0.9				Dam.....	(+0.6)		
							Road Relocations.....	(+0.5)		
							Access Road.....	(-0.8)	+0.9	
							Construction Supervision.....	(+0.6)		
SUBTOTAL, Upper Feather Area.....	17.9	21.8	+3.9		+1.3				+2.7	-0.3
OROVILLE AREA:										
Oroville Dam and reservoir.....	311.5	307.6	-3.9				Dam.....	(-0.6)		
							Feather River Hatchery.....	(+0.6)		
							Feather River Railroad.....	(-8.6)		
							Relocations.....	(-1.8)	-10.4	+0.6
Oroville-Thermalito Power Facilities.....	148.7	170.9	+22.2	Monitor & Control System.....	+1.7		Powerplant.....	(+5.8)		
							Thermalito Powerplant.....	(+2.7)		
							Thermalito Diversion Dam.....	(+1.4)	+11.7	+1.6
							Other Features.....	(+1.7)	+1.3	+2.2
SUBTOTAL, Oroville Area.....	460.2	478.5	+18.3		+1.7					

TABLE 5—Continued
(Table 12 from DWR Bulletin 132-66)
GENERAL RECONCILIATION OF CAPITAL COST CHANGES
(in millions of dollars)

Project facilities	Costs of additional features			Changes in costs items								
	Bulletin No. 132-65	Bulletin No. 132-66	Change	Feature ¹	Cost	Advanced plan-ning ²	Design and construction ³			Right of way ⁴	Pre-oper-ating ⁵	
							Feature	Change				
DELTA FACILITIES-----	154.2	55.1	-99.1 ⁶						-99.1 ⁶		+0.9	
UPPER EEL RIVER DEVELOP- MENT-----	220.3	226.5	+6.2			+5.3			+0.5	+0.1	-0.2	
NORTH BAY AQUEDUCT-----	9.3	10.5	+1.2	Monitor & Control System-----	+0.8			Aqueduct-----	(+0.5)			
SOUTH BAY AQUEDUCT-----	50.2	59.4	+9.2	Monitor & Control System-----	+0.6			Del Valle Dam & reservoir-- Del Valle Pumping Plant-- Aqueduct-----	(+6.0) (+0.1) (+1.0)	+7.1	+1.5	
SUBTOTAL-----	434.0	351.5	-82.5		+1.4	+5.3			-91.5	+1.6	+0.7	
CALIFORNIA AQUEDUCT:												
North San Joaquin Division-----	120.4	134.8	+14.4	Clifton Court Forebay----- Monitor & Control System (+10.3) (+5.3)	+15.6			Delta Pumping Plant----- Aqueduct-----	(-7.0) (-1.1)	-8.1	+8.0	
San Luis Division-----	195.7	190.0	-5.7	Monitor & Control System-----	+5.5			San Luis Dam & reservoir-- San Luis Forebay----- Pumping-Generating Plant Dos Amigos Pumping Plant Canal----- Channels, Levees, Flood- works-----	(-1.7) (-0.7) (+0.9) (-0.3) (-2.8) (-10.0)		+1.1	
South San Joaquin Division-----	235.3	252.3	+17.0	Monitor & Control System-----	+6.0			Buena Vista Pumping Plant Design & Construction--- Construction Supervision--- Contingencies----- Aqueduct—Turnman to Buena Vista P.P.----- Aqueduct—Wheeler Ridge P.P. to Wind Gap P.P.--- Aqueduct—Wind Gap P.P.--- Tehachapi P.P.----- Aqueduct—Other Reaches---	(+2.7) (+2.0) (+2.3) (+5.7) (-2.7) (-3.0) (-1.2)	-14.6	+0.7	+2.7
									+5.8	+5.2		

short-term funding requirements, the development of accurate data regarding the question of long-term financial requirements has been impossible. The two principal unknown factors which will have a significant bearing upon the amount of the ultimate deficiency are the San Joaquin Valley Master Drain and the Peripheral Canal. The question of the first additional facilities appears to have been resolved through the execution of the memorandum of understanding between the Department of Water Resources and the U.S. Army Corps of Engineers. It should be recognized, however, that the amount of the deficiency for both the long and short term could be affected, either favorably or unfavorably, by the construction contracts yet to be awarded. The director of Water Resources has repeatedly brought this possibility to the public's attention by pointing out that in excess of \$500,000,000 in construction contracts remain to be awarded.

While we tend to agree with the director that we should not attempt to finally resolve the project's long-term funding problems until such time as certain major issues are resolved, we do not believe that this important matter should be ignored by the Legislature until we have all of the answers.

We know there will be a long-term funding problem even though we may not know its magnitude. Whatever we do now will ease the burden at some future time. It is for this fundamental reason, coupled with the fact that we have an obligation to replace whatever amount of money is made immediately available by avoiding bond offset, that this committee has recommended increasing the annual allocation of tideland funds to water development for more than the proposed three-year period.

While an additional general obligation bond issue for completion of the State Water Project may be necessary sometime in the future, we cannot say for certain when it might be required or in what amount and, therefore, cannot recommend such a proposal at this time.

If the additional \$14 million appropriation of state tidelands oil and gas revenues to water development were to continue indefinitely, as recommended by this committee, it is possible that such additional capital would be sufficient to overcome even the long-term funding deficiency. This would enable the deferment of another general obligation bond issue until such time as additional project units could be justified.

Tables 6 and 7, which were prepared by the Department of Water Resources, indicate the construction schedule which will be followed if the recommended additional financing is provided and the funding which will remain available to the department to cover construction contingencies *and to finance the cost of the San Joaquin Valley Drain and any costs of the Upper Eel River development or other north coastal development not covered by offset bonds if such additional funding is provided in perpetuity.*

This tabulation indicates that the provision of additional funds as recommended by this committee *may* well serve to eliminate our long-term funding problems. As can be seen, if such legislation is passed, an estimated \$161 million will remain available in 1985 to finance con-

TABLE 6
ANNUAL CAPITAL COSTS OF STATE WATER FACILITIES
Case II Updated to Case IIA
(in millions of dollars)

Year	Case II Minimum Deferment Schedule	Rescheduled facilities								Case IIA ³ Case II Modified per 11/13/67 News Release		
		Abbey Bridge ² Dam and Reservoir		North Bay ² Aqueduct (Phase II)		Devil Canyon Powerplant		Aqueduct, Devil Canyon to Perris and Perris Reservoir			Aqueduct, Oso to Pyramid and Pyramid Pumping plant	
		Case II	Per 1/19/68 Statement	Case II	Per 1/19/68 Statement	Case II	Per 1/19/68 Statement	Case II	Per 1/19/68 Statement		Case II	Per 1/19/68 Statement
Through 1967	1,178	(-)	(+)	(-)	(+)	(-)	(+)	(-)	(+)	(-)	(+)	1,178
1968	336		0.6		0.7		0.7		Availability of additional funds			337
69	358		0.1		0.2		0.2		would allow projects to be constructed			358
1970	215				0.2		0.1		essentially as originally scheduled			215
71	104								in Case II			104
72	47											47
73	43											43
74	39											39
75	44											44
76	19				0.1		0.1					18
77	24	0.5	1.6	0.5	0.5		0.5					23
78	19	2.2	1.2	0.5	1.3		1.3					19
79	18	3.0	1.5	1.3	3.9		3.9					18
1980	23		3.0	3.9	0.2		0.2					23
81	18		0.3	0.2								18
82	14											14
83	3											3
84	9											9
85	5											5
Totals	2,516	5.7	5.6	8.6	7.7							2,515

¹ "Minimum deferment" program shown as Case II through 1975 in Volume I of the department's *Response*, excluding future costs of a San Joaquin drainage facility.

² Design and rights-of-way purchases rescheduled in accordance with Department's November 13, 1967 news release.

³ In accordance with the department's 11/13/67 news release, this construction program will be followed if additional funds are made available.

Availability of additional funds
would allow projects to be constructed
essentially as originally scheduled
in Case II

TABLE 7
(in millions of dollars)

Calendar year	Cumulative total available funds ¹	Cumulative capital costs of the State Water Facilities, excluding the San Joaquin Drain (Case IIA) ²	Balance available for contingencies and for financing the drain and Upper Eel River development
1952-67 -----	1,767	1,178	589
1968 -----	1,931	1,515	416
1969 -----	2,102	1,873	229
1970 -----	2,169	2,088	81
1971 -----	2,225	2,192	33
1972 -----	2,279	2,239	40
1973 -----	2,334	2,282	52
1974 -----	2,376	2,321	55
1975 -----	2,435	2,365	70
1976 -----	2,482	2,383	99
1977 -----	2,510	2,406	104
1978 -----	2,530	2,425	105
1979 -----	2,550	2,443	107
1980 -----	2,568	2,466	102
1981 -----	2,587	2,484	103
1982 -----	2,609	2,498	110
1983 -----	2,631	2,501	130
1984 -----	2,653	2,510	143
1985 -----	2,676	2,515	161 ³

¹ Assumes that legislation similar to AB 15 and SB 11 would be enacted and that the additional \$14 million annual appropriation to the California Water Fund would continue indefinitely. As compared with the schedule in Table 5 of Volume I, these figures reflect a slightly different reservation and application of miscellaneous receipts to bond service. Excludes "bond offset" reservation.

² Pre-1968 costs ----- \$1,178 million
 Deferrable and nondeferrable expenditures (Case IIA), 1968-75 ----- \$1,187 million
 Davis-Grunsky reservation remaining after 1975 ----- \$ 19 million
 Remaining California and North Bay Aqueducts after 1975 ----- \$ 100 million
 Buttes Dam and Reservoir ----- \$ 21 million
 Abbey Bridge and Dixie Refuge Reservoirs ----- \$ 10 million
 \$2,515 million

³ Represents total amount available during the construction period of the State Water Facilities that would be available for the costs of contingencies and the San Joaquin Drain.

struction of the San Joaquin Drain and north coastal development after all of the State Water Facilities, excluding the drain, are completed.

Of course, no one can guarantee that this amount will in fact be available. This estimate is, however, based upon the best data presently available and takes into consideration construction cost escalation for the remaining facilities at the rate of 2½ percent annually for construction contracts and 4 percent for state operations.

The actual amount which will be available in 1985 will obviously be affected by many of the factors heretofore mentioned. The "contingency" factor could serve to materially change this figure as unforeseen problems, such as are presently occurring in the Tehachapi crossing, could substantially increase construction costs.

While we cannot rule out the possibility of another bond issue and recognize that one may ultimately be necessary, we believe that the soundest approach presently available for the long-term as well as the short is to approve an additional \$14 million annually from state oil and gas revenues for water development and to avoid the offset requirement of the Burns-Porter Act during 1968 and 1969.

APPENDICES

I. SUMMARY HISTORY OF FINANCING OF THE STATE WATER PROJECT

Financing of actual construction of the State Water Project commenced in 1957 when the Legislature provided the Department of Water Resources with \$25,190,000 to permit a start on relocation of utilities within the Oroville Dam and Reservoir site including the state highway and the Western Pacific Railroad. The appropriation was from the Investment Fund, which had been created in 1956 as a depository for the state's share of Long Beach tidelands oil revenues. Earlier appropriations from the state's General Fund had supported planning, exploration, and design work. Additional appropriations from the tidelands oil source in 1958, 1959, and 1960, permitted continuation of the Oroville relocations, and in 1959 a start was made on construction of the South Bay Aqueduct.

The purpose of the Burns-Porter Act (now Water Code Secs. 12930 et seq.), adopted by the Legislature in 1959 and ratified by the electorate of California in 1960, was to provide funds to assist in construction of the "State Water Resources Development System." This included the "State Water Facilities," comprising five reservoirs in the watershed of the Upper Feather River; Oroville Reservoir and appurtenances; improvements in the Sacramento-San Joaquin Delta; an aqueduct system to transfer water from the delta to southern California (including the joint federal-state San Luis Project), to the central coastal area, and to both the north and south San Francisco Bay areas; drainage facilities for the San Joaquin Valley; facilities for generation and transmission of electrical energy; and water development facilities for local areas (Davis-Grunsky grants and loans). Also included under terms of the act were so-called "additional facilities," consisting of water development for local needs including flood control, and for augmentation of water supplies in the delta from works in the watersheds of the Sacramento River and certain named north coastal streams. The act provided for acquisition, construction, operation, and maintenance of the facilities under provisions of the Water Code pertaining to the state's Central Valley Project.

The Burns-Porter Act authorized the issue of general obligation bonds for the foregoing purposes, backed by the credit of the state, in the amount of \$1,750,000,000. However, it was contemplated that revenues from the State Water Resources Development System, hereinafter loosely termed the State Water Project, would service and retire the bonds. The act created the California Water Resources Development Bond Fund to receive bond sales proceeds, and appropriated such deposits to the department for expenditure.

The California Water Fund was also created in 1959, successor to the Investment Fund, whose resources were transferred to it, and moneys in the California Water Fund were made available for project construction. These amounted to about \$97,000,000 at the time of ratification of the Burns-Porter Act in 1960. Prior to this, slightly over \$100,000,000 had been appropriated to the department from the General Fund, the Investment Fund, and the California Water Fund for project purposes.

The Burns-Porter Act contained several provisions that significantly limited or prescribed the financing authorization. Bonds in the amount

of \$130,000,000 were reserved exclusively for water development for local areas (Davis-Grunsky loans and grants), leaving only \$1,620,000,000 for construction of remaining features of the State Water Project. Of even greater significance were the so-called "offset provisions," the overall effect of which was to reserve bonds, in the amount of any project expenditures from the California Water Fund, exclusively for developments to meet local water needs including flood control, and for augmenting the supplies of water in the delta. The act further required that California Water Fund moneys or surplus project revenues, when available, be used for construction in lieu of bond sales proceeds.

Early in 1959, just prior to consideration of the Burns-Porter Act by the Legislature, cost estimates prepared by the department indicated that the state's share of capital costs of the project would be \$1,946,664,000, as shown in the following tabulation:

**ESTIMATE OF CONSTRUCTION COSTS OF STATE WATER PROJECT
AS COMPILED IN 1959, PRIOR TO BURNS-PORTER ACT**

<i>Feature</i>	<i>State cost</i>	<i>Federal cost</i>	<i>Total</i>
Upper Feather River -----	\$7,051,000	-----	\$7,051,000
Oroville -----	388,416,000	\$70,000,000	458,416,000
Delta Unit -----	53,073,000	30,000,000	83,073,000
North Bay Aqueduct -----	28,365,000	-----	28,365,000
South Bay Aqueduct -----	34,912,000	-----	34,912,000
Pacheco Pass Tunnel-Aqueduct -----	15,200,000	-----	15,200,000
Southern California Aqueduct System	1,265,047,000	170,800,000	1,435,847,000
San Joaquin Valley Drainage Project	24,600,000	-----	24,600,000
Local Projects -----	130,000,000	-----	130,000,000
Totals -----	\$1,946,664,000	\$270,800,000	\$2,217,464,000

At that time, construction for the project in the amount of \$26,838,000 had been completed, and the department estimated that a further \$172,000,000 toward construction expenditures would become available by transfers from the Investment Fund. Thus, the remaining state financing requirement for the project was estimated to be \$1,747,826,000, a figure destined to serve as one of the bases for the Burns-Porter authorization of \$1,750,000,000 in bonding capacity.

The project features then visualized included aqueduct facilities with capacity to meet needs of the service areas until the year 2020. They did not, however, include works for future augmentation of water supplies in the delta, as were subsequently provided for in the Burns-Porter Act. In this connection, the Upper Eel River Development to provide such augmentation, and now an authorized feature of the project, was then estimated to cost \$138,000,000. The Pacheco Pass Tunnel and Aqueduct, estimated to cost \$15,200,000, and then a project feature, has since become a federal responsibility as the proposed San Felipe Project.

It should be noted that the 1959 forecast of financing needs omitted several real and substantial items of project cost. Although future escalation of construction costs through inflation had been estimated by the department at \$268,474,000 (15 percent of remaining construction costs, exclusive of local projects), allowance for such escalation was not included in later financing arrangements. Neither was any provision

made for interest during construction, the net effect of which has been to add about \$100,000,000 to funding requirements for the project.

Thus, it can be demonstrated, as shown in the following tabulation, that the actual financing requirements for those State Water Project features as were subsequently prescribed under the Burns-Porter Act, on the basis of prior department estimates, were of the order of \$2,275,000,000, and that the Burns-Porter authorization was short of meeting these requirements by about \$525,000,000:

State cost of initial features (from preceding table) -----		\$1,946,664,000
Plus: Upper Eel River Development -----		138,000,000
Plus: Escalation (15 percent of uncompleted construction costs, exclusive of local projects) -----		289,174,000
Plus: Interest during construction -----		100,000,000
		<u>\$2,473,838,000</u>
Less: Completed construction -----	\$26,838,000	
Anticipated receipts from Investment Fund -----	172,000,000	
	<u>\$198,838,000</u>	<u>\$198,838,000</u>
Total financing requirement -----		\$2,275,000,000
Burns-Porter bond authorization -----		1,750,000,000
Shortage -----		<u>\$525,000,000</u>

Recognizing that the State Water Project was underfinanced, the department took action following legislative enactment of the Burns-Porter Act to reduce costs of the included features. Essentially, this involved reduction in capacity of the aqueduct features to meet 1990 demands, rather than those of 2020 as had been previously planned. The resultant cost estimate for the project, compiled in mid-1960, was \$1,957,285,000 for the state costs, as shown in the following tabulation. In addition to the decrease in aqueduct capacity, this new estimate provided \$168,462,000 (from bond offset funds) for the Middle Fork Eel River Project, and deleted the \$15,200,000 previously provided for the Pacheco Pass Tunnel and Aqueduct.

**ESTIMATE OF CONSTRUCTION COSTS OF STATE WATER PROJECT
AS COMPILED IN 1960, AFTER BURNS-PORTER ACT**

<i>Feature</i>	<i>State cost</i>	<i>Federal cost</i>	<i>Total</i>
Upper Feather River -----	\$9,325,000	----	\$9,325,000
Oroville -----	349,139,000	\$75,000,000 ¹	424,139,000
Delta Unit ² -----	56,403,000	30,000,000	86,403,000
North Bay Aqueduct -----	24,714,000	----	24,714,000
South Bay Aqueduct -----	41,192,000	4,500,000	45,692,000
Southern California Aqueduct System -----	1,147,319,000	141,009,000	1,288,328,000
San Joaquin Valley- Southern California Aqueduct -----	(673,683,000)	(141,009,000)	(814,692,000)
Coastal Aqueduct -----	(66,916,000)	----	(66,916,000)
Fairmont Diversion -----	(45,920,000)	----	(45,920,000)
East Branch -----	(360,800,000)	----	(360,800,000)
San Joaquin Valley Drainage Project -----	15,731,000 ³	----	15,731,000
Middle Fork Eel River Project -----	168,462,000	----	168,462,000
Local Projects -----	145,000,000	----	145,000,000
Totals -----	<u>\$1,957,285,000</u>	<u>\$250,509,000</u>	<u>\$2,207,794,000</u>

¹ Estimated as being \$10 million high.

² Now known as Peripheral Canal; state cost unknown.

³ Now estimated at \$42 million.

In January 1960, the department contracted with Charles T. Main, Inc., engineering consultants of Boston, to make a complete independent analysis of all aspects of the project, including detailed appraisal of engineering and economic feasibility. Concurrently a contract was entered into with Dillon, Read and Co., Inc., financial consultants of New York, to analyze financial aspects of the program. The principal policy guidelines given these firms by the department were to the effect that rates for water and power sales would be so established as to return to the state all costs of operation and maintenance, principal and interest on bonds, and expenditures from the California Water Fund and other moneys used for construction. Project features and cost estimates considered by the consultants were as shown in the preceding tabulation.

In October 1960, Charles T. Main, Inc., declared the project to be engineeringly feasible, but gave qualified answers to the questions of economic and financial feasibility. A schedule of construction was proposed based solely on meeting projected water demands and without regard to needs for flood control. Construction of the delta improvements and the aqueduct system would commence immediately, but completion of the Oroville facilities would be deferred until 1982, and the Middle Fork Eel River Project until 1988. On these bases, and on the assumption that 1960 costs would prevail throughout the construction period, the firm concluded that the project could pay back all costs, except interest on California Water Funds and other moneys previously expended. It pointed out the probability that construction costs would escalate, questioned the ability of agricultural water users to repay their share of costs, and declared that the state must be prepared to assume the risk that it might not be completely reimbursed during the bond repayment period. Specifically, it stated that the Burns-Porter Act fell slightly short of providing sufficient construction funds on the basis of 1960 costs.

Dillon, Read and Co., Inc., generally substantiated the Charles T. Main conclusions relating to financing of the project. On the same bases and assumptions, the firm found a shortage of \$54,000,000 in financing for construction. It cited the long-term upward trend in construction costs and the lack of provision in the program for possible future escalation. It also pointed out that budgeted construction expenditures included no interest during construction and that such interest not covered by concurrent project revenues would have to be temporarily advanced from the General Fund.

The state did not choose to postpone construction of the Oroville facilities as recommended by the consultants, and thereby ease the financing problems inherent in the Burns-Porter authorization. Rather, influenced by the urgent need for flood control on the Feather River which had been tragically demonstrated by the Yuba City disaster of 1955, decision was made to continue expeditiously with construction at Oroville as previously planned, with completion scheduled in 1968. Validity of this decision was proven when the partially constructed Oroville Dam prevented downstream damage during the all-time record flood of 1964-65. The adverse effects of the decision on project financing have not been determined in dollar terms.

INCREASES IN PROJECT COSTS SINCE 1960

A number of actions or changes have increased costs to the state of the State Water Project over those estimated in 1960, and considered by Charles T. Main, Inc., and Dillon, Read and Co., Inc. These include increases in project yield and aqueduct capacity, shifts in the distribution of project water among the service areas, additions and deletions to project features or parts thereof, and the combined effects of inflation and changes in the earlier cost estimates. The amounts of these increased costs, as cited in the following paragraphs, were estimated by the department as of April 1966. The cost estimates are presently under revision.

As planned in 1960, firm annual water yield of the State Water Project was 4,000,000 acre-feet. However, in 1963 the Supreme Court of the United States decided adversely to California in its suit with Arizona on water rights in the Colorado River, reducing the waters from that source available to southern California. To partially offset this loss, decision was made by the department, and necessary approvals obtained in 1964, to increase annual project yield and aqueduct capacity to southern California by 230,000 acre-feet. The resultant increase in project capital costs was estimated to be about \$84,000,000.

Under a program initiated in the spring of 1960, water sales contracts, designed to return to the state all allocated costs of the water, were negotiated with potential water user agencies. To date, contracts have been executed with 30 agencies for all except 8,600 acre-feet of the 4,230,000 acre-foot annual yield of the project. Contracts for the remaining yield are under negotiation. (Additional contracts and commitments have exhausted the supply.) Contractual commitments to principal service areas are as follows:

<i>Service area</i>	<i>Maximum annual entitlement, in acre-feet</i>
Feather River -----	39,800
North Bay -----	67,000
South Bay -----	188,000
San Joaquin Valley -----	1,351,000
Central Coast -----	82,700
Southern California -----	2,492,900
Total -----	4,221,400

As scheduled under the contracts, delivery of water to the south bay area commenced in 1962. Deliveries to agencies in the Feather River service area will start in 1968, to those in the north bay area in 1968, to Kern County agencies in 1968, to those in southern California served by the West Branch in 1971, and by the East Branch in 1972. Delivery to the central coastal area is not scheduled until 1980. (Delivery dates to north bay and Kern County have been met.)

During the main period of water contract negotiations ending in 1964, a substantial shift in geographical distribution of the original 4,000,000 acre-feet of annual project yield was effected. This displacement of about 500,000 acre-feet of yield from northerly service areas to southern California was accompanied by a shift from agricultural to municipal and industrial water use. It was caused by failure of the service areas north of the Tehachapis to exercise their full options and by increased urgency of demands in southern California resultant from the Colorado River decision. The net effect of these changes on project

financing was an estimated increase in construction costs of about \$86,000,000.

Although the State Water Project comprises essentially the same basic features today as in 1960, many additions, deletions, and substantive changes have occurred, other than those heretofore discussed. Design or contractual considerations have induced most of such alterations. As an example, power facilities were added (added capacity and pump-storage facilities) at Oroville. Also, the North Bay Aqueduct was reduced in size and scope when water sales contracts were not obtained in Marin and Sonoma Counties. The now proposed Peripheral Canal differs in concept and layout from the delta works planned in 1960, and the Clifton Court Forebay is an addition to the Delta Pumping Plant. Airpoint Reservoir and the Doolan Branch are no longer components of the South Bay Aqueduct.

Numerous changes have been made in the main California Aqueduct, including the addition of provisions for automated monitoring and control of the entire system. Also, there is a deficiency of about 1,000 cubic feet per second in aqueduct conveyance capacity in the San Luis Division as constructed by the U.S. Bureau of Reclamation. This was occasioned by the fact that the design capacity was established by the bureau before the department's water sales contracting program was completed. The department's cost estimates include allowance for constructing additional conveyance capacity to eliminate the deficiency, on the assumption of the allocated state share of a parallel canal.

In 1960, a direct steam-drive scheme was planned for the Tehachapi Pumping Plant, but this has been deleted in favor of electric drive. The West Branch of the aqueduct has been radically revised, not only by major changes and additions to its power facilities, as will later be described, but in physical layout and water regulatory and delivery facilities. Major changes have been made in the East Branch as well, including the power facilities and reduction in size of Cedar Springs Reservoir (now Lake Silverwood).

The overall net effect of such additions, deletions, and changes, from 1960 to April 1966, was to add substantially to construction costs and financing problems of the project. The estimated added cost was about \$156,000,000.

In addition to the foregoing, at the request of the Metropolitan Water District of Southern California, excess capacity in the amount of 238 cubic feet per second will be built into the California Aqueduct from Kettleman City south to the West Branch, and 809 cubic feet per second into the West Branch itself. Although the estimated costs of \$33,000,000 will be advanced to the department by the district, this item does constitute an added construction cost, and was so considered in the department's 1966 estimates.

The final general category of increases in project costs to the state between 1960 and 1966, as estimated by the department, reflected the combined effects of refinements in design and cost estimating, including minor changes in project features, and escalation of unit construction costs between 1960 and 1966 caused by inflation. This category of increase was estimated to be about \$92,000,000.

In summary, the department estimated in April 1966 that construction costs of the State Water Project to the state had increased by

\$451,000,000 over the estimates of 1960, as shown in the following tabulation.

ESTIMATED INCREASE IN PROJECT COSTS, 1960-1966

<i>Cause</i>	<i>Amount</i>
Increased project yield -----	\$84,000,000
Redistribution of project yield -----	86,000,000
Changes in project features -----	156,000,000
Excess aqueduct capacity -----	33,000,000
Design refinements and inflation -----	92,000,000
Total -----	\$451,000,000

However, in order to completely reconcile the department's 1960 project cost estimates with those made in 1966 and subsequently, an adjustment of a "bookkeeping" nature is necessary. Under the department's current practice, all costs of those joint state-federal features as are assumed will be constructed by the state are included in the state's capital requirements, even though some portion may be reimbursed by the federal government. In its bookkeeping, the department then applies the federal contributions to "miscellaneous receipts" from the project, available as a source of financing. (A similar practice is employed in connection with advances made to the project from the water contracting agencies for requested excess aqueduct capacity and certain other contributions for construction.)

On the other hand, in the department's 1960 and earlier cost estimates, such federal contributions were deducted from capital costs to the state. For this reason, an adjustment of \$125,000,000 must now be added to the 1960 project cost estimate of \$1,957,000,000, a total of \$2,082,000,000, to bring it into correspondence with the 1966 estimate of \$2,533,000,000.

Since the time of compilation of the foregoing estimates, that is, from early 1966 to date, additional important changes in project features have occurred. Furthermore, construction cost estimates are under revision by the department, including allowances for future escalation resulting from inflationary factors. Preliminary and unofficial figures from these new estimates are now available (May 1, 1967), and shown in the following tabulation. The changes since 1966 are discussed in the ensuing paragraphs.

**ESTIMATE OF CONSTRUCTION COSTS OF STATE WATER PROJECT
AS COMPILED ON MAY 1, 1967**

(Preliminary and Unofficial)

<i>Feature</i>	<i>State cost</i>	
	<i>Without escalation</i>	<i>With escalation</i>
Upper Feather River -----	\$23,000,000	\$25,000,000
Oroville -----	486,000,000	487,000,000
Delta Facilities -----	55,000,000	55,000,000
North Bay Aqueduct -----	13,000,000	15,000,000
South Bay Aqueduct -----	68,000,000	68,000,000
California Aqueduct -----	1,606,000,000	1,648,000,000
San Joaquin Valley Drain -----	43,000,000	43,000,000
Upper Eel River Development -----	239,000,000	349,000,000
Davis-Grunsky Program -----	131,000,000	131,000,000
Sunk Costs, etc. -----	4,000,000	4,000,000
Total -----	\$2,663,000,000	\$2,825,000,000 *

* Listed as \$2.818 billion in the "response" to the task force.

During 1966, and at the request of the Metropolitan Water District of Southern California, decision was made to build into key structures of the East Branch, including the San Bernardino Tunnel, provisions for certain excess capacity. Likewise, provision will be made for eventually increasing the regulatory storage capacity of Perris Reservoir from 100,000 to 500,000 acre-feet. The added construction costs, estimated to be about \$17,000,000, will be advanced to the department by the district.

In September 1966, a contract was signed among the State Department of Water Resources and the Department of Water and Power of the City of Los Angeles, providing for cooperative power development of the drop available on the West Branch between Pyramid and Castaic Reservoirs. The contract contemplates a much larger development than was previously planned by the state. Diameter of the Angeles Tunnel, to be constructed by the state, will be increased from 17 to 30 feet, permitting large releases of water from Pyramid Reservoir during peak power demand periods. Taking advantage of these large flows and the 1,000-foot drop involved, the city will construct and operate a powerplant of 1,250,000 kw installed capacity at Castaic Reservoir, as a peaking facility. The capability will exist to develop a pump-storage operation, pumping water back to Pyramid Reservoir during offpeak periods. The state and city will share equitably in substantial added benefits. Although the state will incur added construction costs of about \$26,000,000 prior to 1970, these will be more than reimbursed by the city by 1974.

Among other changes incorporated in the current department estimates, there is an increase of \$8,000,000 to complete the Oroville Powerplant, and one of \$9,000,000 in connection with Del Valle Dam and Reservoir. Costs of the San Joaquin Division of the California Aqueduct are upped by \$31,000,000 to cover the Clifton Court Forebay, certain previously omitted pumps, and repairs of major slide damage. State costs of the Upper Eel River Development are \$12,000,000 higher than estimated in 1966 (federal participation in this feature is assumed, but the allocated federal costs are not included in the estimate of state capital expenditures). (1967 memorandum agreement provides for Corps of Engineers construction of the dam and reservoir and state construction of conveyance facilities to the Sacramento Valley.)

The current department estimate foresees a one-year delay in construction of a joint state-federal peripheral canal, with no change in the estimated state costs (which again do not include the federal share of this assumed joint project). A very recent bid opening for construction of Castaic Dam has resulted in a reduction of \$22,000,000 in estimated costs for that facility. The department has decided to delay construction of drainage facilities in the San Joaquin Valley until repayment contracts are obtained, and not enter into a joint project with the federal government, but to acquire necessary rights-of-way at this time, with estimated costs reduced by \$11,000,000.

The net effect of the described major changes since early 1966, as well as others of lesser magnitude, is to increase the department's estimate of cost of the project by \$135,000,000. In addition, and for the

first time, an item is included to cover future escalation of construction costs caused by inflationary factors, estimated to be \$157,000,000.

Thus, in final summary, the actual basic increase in estimated costs to the state of the State Water Project since 1960 is of the order of \$586,000,000, as shown in the following tabulation. However, with added allowances for differing treatment of federally reimbursed costs, and for escalation of future construction costs, the 1960 estimate of \$1,957,000,000 has increased to a current figure of \$2,825,000,000, or by an amount of \$868,000,000.

**INCREASE IN ESTIMATED CONSTRUCTION COSTS TO THE STATE
OF THE STATE WATER PROJECT FROM 1960 TO 1967**

1960 cost estimate		\$1,957,000,000
Adjustment for treatment of federally reimbursed costs		125,000,000
Adjusted 1960 cost estimate		\$2,082,000,000
Basic cost increase, 1960-66	\$451,000,000	
Basic cost increase, 1966-67	135,000,000	
	<hr/>	<hr/>
	\$586,000,000	586,000,000
1967 cost estimate without escalation		\$2,668,000,000
Escalation of future construction costs		157,000,000
1967 cost estimate		<hr/>
		\$2,825,000,000

PROJECT EXPENDITURES TO DATE

As of March 31, 1967, expenditures by the department for construction of the State Water Project had reached a figure of \$894,229,000, exclusive of monies disbursed for local projects under the Davis-Grunsky Act. This is about 33 percent of current cost estimates for completion of the entire project.

Construction contracts actually completed totaled \$172,500,000, and another \$769,100,000 in contract work was underway. This work completed or underway represented about 57 percent of the contracts planned for completion by June 30, 1972, when water will first be delivered to Perris Reservoir (excluding any expenditures for the Peripheral Canal or the Upper Eel River Development).

As of March 31, 1967, commitment of funds by the department for local projects under provisions of the Davis-Grunsky Act totaled \$45,123,000, consisting of \$4,267,000 for loans, and \$40,856,000 for grants. The commitment was in the form of approved final applications to the department by local agencies. Of the commitment, funds in the amount of \$22,789,000 had been actually disbursed by the department to local agencies.

REMAINING FINANCING CAPABILITY OF THE PROJECT

It is appropriate now to examine the financing capability remaining to the State Water Project within existing authorizations. Funds that are now or may be available to the department for meeting project expenditures come from four sources: (1) sale of general obligation bonds within the \$1,750,000,000 Burns-Porter authorization, (2) appropriations to the California Water Fund from tideland oil revenues,

(3) "miscellaneous receipts" by the project, and (4) sale of revenue bonds supported by Oroville-Thermalito power.

Sale of the general obligation bonds was delayed by litigation which was decided by the California Supreme Court in 1963, and the first sale was on February 18, 1964. Bond anticipation notes in the amount of \$50,000,000 were sold in 1963, and retired in 1964 after the first bond sale. As of March 31, 1967, bonds in the amount of \$750,000,000 had been sold for the project, at an average net interest rate of 3.709 percent. Bonds remaining to be sold within the authorization amounted to \$1,000,000,000, but of these \$158,313,000 were offset, or reserved exclusively for construction of local projects and augmentation of delta water supplies. Another \$107,211,000 of the unsold bonds were reserved exclusively for Davis-Grunsky projects (\$130,000,000 less the \$22,789,000 already disbursed), leaving \$734,476,000 in remaining bonds available for construction of project facilities. This amount will be further reduced by future expenditures from the California Water Fund, under the offset provisions of the Burns-Porter Act.

Since the Burns-Porter Act became effective in 1960, the department has continued to receive appropriations to the California Water Fund from the tidelands oil source, and to expend them for project purposes, including Davis-Grunsky, prior to bond sale proceeds as required by law. These appropriations have aggregated \$158,313,000 as of March 31, 1967, the amount of the offset bonds mentioned in the preceding paragraph. The current rate of annual appropriation is \$11,000,000, and it is anticipated that this will continue in the future. Of course, at such time as the general obligation bonds are all sold or reserved, the offset provisions will expire, and any California Water Fund moneys thereafter used for project construction will no longer enhance in equal amount the funds set aside for future construction of local projects and augmentation of delta water supplies.

The State Water Project is or will be the recipient of other moneys from various project-oriented sources. These include federal flood control contributions, advance payments by water contractors, payments by the City of Los Angeles for West Branch power facilities, among others. In departmental nomenclature, these are collectively termed "miscellaneous receipts."

In 1966, the Legislature, under the provisions of AB 12, committed itself to appropriate to the department up to \$5,000,000 annually as reimbursement of those project funds expended for enhancement of recreation, and fish and wildlife, values that are properly allocated to the state rather than the water users. Such appropriations, also from the tidelands oil source, will be included by the department in "miscellaneous receipts." It is anticipated that they will commence in the current year, 1967, and continue at the \$5,000,000 annual level in the future.

In 1963, the department adopted the policy of setting aside "miscellaneous receipts" as a reserve to assure its ability to service the general obligation bonds, without recourse to the State General Fund. Such a reserve has been deemed essential by the department and its financial consultants in order to maintain the high rating of the state in the bond market. Thus, the moneys accumulated in "miscellaneous re-

ceipts" are not considered to be available for project construction at this time. The reserve will contain an estimated \$61,317,000 as of June 30, 1967, and will increase to \$86,695,000 a year later.

Recognizing the shortages inherent in financing authorizations for the State Water Project, the department in 1963 proposed to issue revenue bonds under the authorization contained in the Central Valley Project Act, and based upon the sale of Oroville-Thermalito power. The authority to issue such bonds was upheld by the California Supreme Court in the same year. Originally it was estimated that the sale of these bonds would net some \$267,000,000 in additional construction funds for the project. However, a contract for the sale of Oroville-Thermalito power is still under negotiation. The value of the power has reduced since 1963, in a continuing trend, and it is now forecast that the net bond proceeds will be about \$210,000,000. (As a result of the Oroville-Thermalito power contract this amount is now estimated at \$250 million.)

In summary, then, the remaining financing capability of the project includes about \$735,000,000 in unsold general obligation bonds, and an anticipated \$210,000,000 in revenue bonds, a total of about \$945,000,000. An additional \$158,300,000 in general obligation bonds are reserved under the offset provisions and \$107,000,000 for Davis-Grunsky projects. California Water Fund appropriations should continue to accrue to the project at an \$11,000,000 annual rate, offsetting an equal amount of the unsold general obligation bonds. Miscellaneous receipts, now totalling about \$61,300,000 will continue to accrue to the project, to the amount of \$300,000,000 by 1985, but are now reserved for bond service requirements.

ADDITIONAL FINANCING NEEDS

Any definitive determination of new funding needed to meet State Water Project obligations will involve engineering, legal, and policy decisions still to be made. It will involve also the outcome of difficult negotiations with local and federal agencies. Certain features of the project may be reduced in cost, or postponed, or eliminated. Decisions must be made as to timing of construction, and type and extent of federal participation in the Peripheral Canal and the (see previous notes) Upper Eel River Development. Scheduling and repayment aspects of the San Joaquin Valley Drain have not been determined.

The department is now actively studying alternative means of reducing future project expenditures in order to alleviate the financing problems it faces. The short-range financing problem, that which will occur between now and 1972 when project water will first be delivered to Perris Reservoir, has been variously defined by estimates of shortages ranging up to almost \$300,000,000, dependent upon the set of assumptions used. These also indicate that funds for project construction may have to be supplemented as early as 1970.

An example of one of these forecasts, based on data as of December 31, 1966, is presented in the following tabulation, which compares the department's scheduled construction expenditures with available funds. The construction cost estimate includes escalation. The forecast assumes that miscellaneous receipts will be used to service bonds during the

period, but that no reserve for this purpose will be maintained, the excess being employed for construction.

FORECAST OF FINANCING NEEDS, 1967-1972

(See table, "Forecast of Financing Needs," response to task force, p. 51)

Scheduled construction expenditures (includes bond service) -----		\$1,554,000,000
Available funding capability		
General obligation bonds and California		
Water Fund -----	\$974,000,000	
Revenue bonds -----	210,000,000	
Miscellaneous receipts -----	210,000,000 *	
	<u>\$1,394,000,000</u>	<u>1,394,000,000</u>
Shortage -----		\$160,000,000

* See previous notes.

It should be commented that this forecast is not necessarily realistic, in that project operational requirements may well force an immediate start on construction of the Peripheral Canal without federal participation and cost sharing, and in that a substantial reserve may have to be maintained for bond service to preserve the state credit. These considerations and others could increase the indicated shortage by as much as \$100,000,000, to a total of about \$260,000,000.

The long-term financing problem facing the State Water Project encompasses the period from today until completion of all features prescribed under the Burns-Porter Act, including augmentation of the delta water supply, estimated to be about 1985. For this period the need for additional financing capability has been variously estimated up to about \$600,000,000, depending upon the set of assumptions used.

For illustrative purposes only, the following tabulation presents a forecast of the long-term financing deficiency, utilizing the data developed earlier in this report, supplemented by department estimates as to California Water Fund moneys and miscellaneous receipts that will be available to meet construction expenditures during the period.

FORECAST OF FINANCING NEEDS, APRIL 1, 1967, THROUGH 1985

Construction expenditures -----		\$2,325,000,000
Less: Expenditures to date -----		917,000,000
Remaining financing requirement -----		<u>\$1,908,000,000</u>
Available funding capacity:		
Unexpended bond proceeds -----	\$94,000,000	
General obligation bonds -----	1,000,000,000 *	
Revenue bonds -----	210,000,000	
California water funds -----	209,000,000	
Miscellaneous receipts in excess of bond service needs -----	200,000,000	
	<u>\$1,713,000,000</u>	<u>\$1,713,000,000</u>
Shortage -----		\$195,000,000

* See previous notes.

Again it should be commented that this forecast is not necessarily realistic. Of particular note in this respect is the fact that only \$43,000,000 are included in the cost estimate for the San Joaquin Valley Drain,

whereas construction of the facility will probably involve added costs of more than \$100,000,000 before 1985. Neither does the forecast estimate provide for substitute water supply facilities for the western delta, as will be required. Furthermore, cost to the state of the Peripheral Canal may well exceed the \$55,000,000 included in the estimate, and it would be conservative to assume state construction, with added financing requirements of at least \$100,000,000 for this feature.

Other items, of a contingency nature, could add several hundred million dollars to the project costs, including a downstream extension or special treatment facilities for the San Joaquin Valley Drain, and a state-constructed parallel canal or alternative means to provide additional capacity in the San Luis reach of the aqueduct. One contingency item of great potential impact on the project is dependent upon the standards of water quality that will be established for the delta and San Francisco Bay as a result of current state and federal programs. If appreciably larger delta outflows are dictated than under present plans, costly additional releases from water stored in either the Sacramento Valley or the north coast would be required. The very preliminary cost estimates for the Upper Eel River Development are especially susceptible to future increase.

It can be foreseen, therefore, that the need for additional project financing capability of about (see previous notes) \$200,000,000, as indicated in the previous tabulation, could well increase to \$600,000,000, or even a larger figure, dependent upon decisions and actions still to be made. The rough estimates of the amount of this need, as cited herein, should be considered only as indicative of the general order of magnitude of the problem. The department is now working to make more precise and definitive estimates of its financing needs, based upon alternative solutions to the various engineering, legal, and policy questions involved.

CONCLUSIONS

There is no doubt that the State Water Project is in eventual need of substantial additional financing capability. If the present construction schedule is followed through 1972, when project water will be delivered to Perris Reservoir, it appears that available funds will need to be supplemented in 1970, and that additional financing of as much as \$300,000,000 may be required to carry the scheduled construction through 1972 and meet contractual obligations. However, the department is now studying means to reduce or defer construction expenditures during this critical financing period. Dependent upon decisions following the outcome of this effort, this "short-term" financing problem could be alleviated.

If the department is to fulfill its obligation to complete the State Water Facilities as defined in the Burns-Porter Act, and as they have now evolved, by the year 1985 or shortly thereafter as is planned to meet water needs, it appears that additional financing of as much as \$600,000,000 may be required.

It may also be concluded, perhaps parenthetically, that the State Water Project has consistently been in need of additional financing, from 1959 when the Burns-Porter Act was considered by the Legislature, up to the present time. Furthermore, the magnitude of indicated

need for additional financing has consistently remained at the order of magnitude of \$500,000,000 throughout this period. This has been true despite the fact that (the) scope of the project has increased in many ways, at added basic costs approaching \$600,000,000, offset only in part by expected revenue bond proceeds and other fundings which were not counted on in 1959. From these considerations it may in turn be concluded that the department has administered construction of the State Water Project at less relative cost than was originally anticipated.

II. LEGISLATIVE COUNSEL'S OPINION

Ila. Central Valley Project Revenue Bonds

LEGISLATIVE COUNSEL OF CALIFORNIA
Sacramento, California, October 13, 1967

HONORABLE GORDON COLOGNE
Post Office Drawer 1270
Indio, California 92201

STATE WATER RESOURCES DEVELOPMENT SYSTEM—#26638

Dear Senator Cologne :

You have asked the questions set forth below concerning the State Water Resources Development System.

QUESTION NO. 1

Is the Department of Water Resources¹ authorized to issue revenue bonds to finance the construction of power recovery facilities even though such facilities are a part of the State Water Facilities described in the California Water Resources Development Bond Act² and are to be constructed on the southern side of the Tehachapi Mountains, not in the Central Valley?

OPINION NO. 1

We think the department is authorized to issue revenue bonds to finance the construction of power recovery facilities even though such facilities are also designated as a part of the State Water Facilities described in the California Water Resources Development Bond Act and are to be constructed on the southern side of the Tehachapi Mountains, not in the Central Valley.

ANALYSIS NO. 1

The Burns-Porter Act (Ch. 8 (commencing with Sec. 12930) Pt. 6, Div. 6, Wat. C.³) provides that its object is to "provide funds to assist in the construction of a State Water Resources Development System for the State of California. Said system shall be comprised of the State Water Facilities as defined in Section 12934 (d) hereof and such additional facilities as may now or hereafter be authorized by the Legislature as a part of (1) the Central Valley Project or (2) the California Water Plan, and including such other additional facilities as the department deems necessary and desirable to meet local needs, including, but not restricted to, flood control, and to augment the supplies of water in the Sacramento-San Joaquin Delta and for which funds are appropriated pursuant to this chapter. . . . Any facilities heretofore or hereafter authorized as a part of the Central Valley Project or facilities which are acquired or constructed as a part of the State Water Resources Development System with funds made available hereunder shall be acquired, constructed, operated, and maintained pursuant to

¹ Hereafter referred to as the department.

² Hereafter referred to as the Burns-Porter Act.

³ Sections referred to are in the Water Code unless otherwise indicated.

the provisions of the code governing the Central Valley Project, as said provisions may now or hereafter be amended. . . ." (Sec. 12931)

The State Water Facilities referred to in the Burns-Porter Act include, among others:

"(1) A mutiple purpose dam and reservoir on the Feather River in the vicinity of Oroville, Butte County, and dams and reservoirs upstream therefrom in Plumas County in the vicinity of Frenchman, Grizzly Valley, Abbey Bridge, Dixie Refuge and Antelope Valley;

"(2) An aqueduct system which will provide for the transportation of water from a point or points at or near the Sacramento-San Joaquin Delta to termini in the Counties of Marin, Alameda, Santa Clara, Santa Barbara, Los Angeles and Riverside, and for delivery of water both at such termini and at canal-side points enroute, for service in Solano, Napa, Sonoma, Marin, Alameda, Contra Costa, Santa Clara, San Benito, Santa Cruz, Fresno, Tulare, Kings, Kern, Los Angeles, Ventura, San Bernardino, Riverside, Orange, San Diego, San Luis Obispo, Monterey and Santa Barbara Counties.

"Said aqueduct system shall consist of intake and diversion works, conduits, tunnels, siphons, pipelines, dams, reservoirs, and pumping facilities, and shall be composed of a North Bay aqueduct extending . . . ; a South Bay aqueduct extending . . . ; a Pacheco Pass Tunnel aqueduct . . . ; a San Joaquin Valley-Southern California aqueduct extending to termini in the vicinity of Newhall, Los Angeles County, and Perris, Riverside County, and having a capacity of not less than 2,500 cubic feet per second at all points north of the northerly boundary of the County of Los Angeles in the Tehachapi Mountains in the vicinity of Quail Lake and a capacity of not less than 10,000 cubic feet per second at all points north of the initial off-stream storage reservoir; a coastal aqueduct beginning on the San Joaquin Valley-Southern California aqueduct in the vicinity of Avenal, Kings County, and extending to a terminal at the Santa Maria River;

"(5) Facilities for the generation and transmission of electrical energy.

" . . ." (Subd. (d), Sec. 12934)

The Burns-Porter Act authorizes the issuance of general obligation bonds in an amount not to exceed \$1,750,000,000 to create a fund to pay for the State Water Facilities and certain other facilities of the State Water Resources Development System (Secs. 12932, 12933, 12935 et seq.). Revenues derived from the sale, delivery or use of water or power and all other income or revenue derived by the state from the State Water Resources Development System must be used under the Burns-Porter Act first to pay the cost of maintaining and operating the system, then to pay principal and interest on the bonds issued pursuant to the act and then, in order, for specified other purposes (Sec. 12937).

The Central Valley Project is administered under Part 3 (commencing with Sec. 11100) of Division 6.⁴ Various facilities are specified as part of the project including many facilities described as State Water Facilities under the Burns-Porter Act (see generally Ch. 2 (commencing with Sec. 11200), Pt. 3, Div. 6) and particularly including an aqueduct system to serve Southern California authorized under Section 11260, which reads:

"11260. The units set forth in publication of the State Water Resources Board entitled 'Report on Feasibility of Feather River Project and Sacramento-San Joaquin Delta Diversion Projects Proposed as Features of the California Water Plan,' dated May, 1951, as modified in the publication of the Division of Water Resources entitled 'Program for Financing and Constructing the Feather River Project as the Initial Unit of the California Water Plan,' dated February, 1955, and including the upstream features set forth in Chapter VI of the 1955 report, except the features on the south fork of the Feather River, and as further modified by the recommendations contained in Bulletin No. 78 of the Department of Water Resources, entitled 'Preliminary Summary Report on Investigation of Alternative Aqueduct Systems to Serve Southern California,' dated February, 1959, and subject to such further modifications thereof as the Department of Water Resources may adopt, and such units or portions thereof may be constructed by the department and maintained and operated by it to such extent and for such period as the department may determine, as units of the Central Valley Project separate and apart from any or all other units thereof."

It should be noted that the facilities authorized by Section 11260 include facilities located south of the Tehachapi Mountains.

The C.V.P. Act also specifically provides that:

"11290. The project includes such other units as may be from time to time added by the department to the units specifically enumerated. The department may add additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part."

The department is empowered by the C.V.P. Act to issue revenue bonds to carry out the objects of the C.V.P. Act and the bonds are not general obligations of the state but constitute first liens on revenues from the Central Valley Project (Secs. 11700, 11705, 11720-11722).

Turning now to your question as to whether the department is authorized to issue revenue bonds to finance construction of power recovery facilities even though such facilities are included in the State Water Facilities authorized by the Burns-Porter Act and are not in the Central Valley, we think it clear that the California courts would permit the issue of such revenue bonds if the facilities were authorized by the C.V.P. Act.

In the case of *Warne v. Harkness*, 60 Cal. 2d 579, the question was presented to the California Supreme Court as to whether the pledge and

⁴ Hereafter referred to as the Central Valley Project Act or the C.V.P. Act.

priority provisions of the Burns-Porter Act repeal the department's authority to issue revenue bonds under the C.V.P. Act; or whether the two acts can and should be reconciled by construing the pledge and priority provisions of the Burns-Porter Act as applying to revenues from facilities constructed with funds made available under that act but as having no application to revenues from facilities financed under the C.V.P. Act (*supra*, p. 585). In that case the revenue bonds were to be issued under the C.V.P. Act to finance the power facilities of the Oroville Dam. The court rejected the contention that because Oroville Dam and its facilities are among the facilities enumerated by the Burns-Porter Act as State Water Facilities it is no longer authorized by the C.V.P. Act (*supra*, p. 584). The court went on to conclude, as to the question set forth above, that the pledge and priority provisions of the Burns-Porter Act do not repeal the provisions in the C.V.P. Act relating to issuance of C.V.P. Act bonds and the pledging of the revenues for the payment of such bonds (*supra*, p. 588), and the court permitted the issuance of the bonds in question.

From the foregoing, we think it clear that the California courts would reach the same conclusion with respect to your question. We do not think that the fact that the facilities are outside the Central Valley would alter this conclusion so long as the facilities are authorized under the C.V.P. Act.

With particular respect to power recovery facilities, the C.V.P. Act contemplates "generation, transmission and distribution of electric power" incidental to activities concerning water (Sec. 11125), and, as previously indicated, the Central Valley Project includes the Feather River Project, involving an aqueduct system to serve Southern California (Sec. 11260) and related power facilities as added to by the department to further the objects of the C.V.P. Act (Sec. 11290). We have no doubt that the Central Valley Project includes its power recovery facilities such as those in question.

Therefore, in view of the court's decision in *Warne v. Harkness*, we think the courts would permit the issue of C.V.P. Act revenue bonds to finance power recovery facilities under the C.V.P. Act even though such facilities are also designated as a part of the State Water Facilities described in the Burns-Porter Act and are to be constructed on the southern side of the Tehachapi Mountains, not in the Central Valley.

QUESTION NO. 2

Could such revenue bonds be issued even if the power developed by the power recovery facilities were used to meet a portion of the department's energy requirements for pumping water in the State Water Resources Development System? In this regard you state that the issuance of revenue bonds for such purposes would require the pledging of revenues collected from state water supply contractors for the cost of power used in supplying water to them, and you ask whether such Burns-Porter Act revenues could be used to repay bonds issued under the C.V.P. Act to construct the power recovery facilities.

OPINION AND ANALYSIS NO. 2

We are unaware of any reason why such revenue bonds could not be so issued under such circumstances.

The court, in *Warne v. Harkness*, apparently agreed with the contention that the pledge and priority provisions of the Burns-Porter Act apply to revenues from facilities constructed with funds made available under that act and that such provisions have no application to revenues from facilities financed under the C.V.P. Act (supra, pp. 585, 588-590). In light of this conclusion we think that revenue bonds could be issued under the C.V.P. Act to finance the construction of power recovery facilities whose power is used to pump water in a pumping facility financed under the Burns-Porter Act; and that the portion of the charge paid by persons using the water attributable to the cost of providing power for the pumping could be pledged to service the C.V.P. Act revenue bonds. The portion of the charges so paid would be C.V.P. Act revenues. While these would be Burns-Porter Act revenues they could, in effect, be used to so pay for power as a part of the operating cost of the State Water Development System.

In other words, this would be an alternative to the department purchasing the needed power for its pumps from a private utility. We do not see any significant distinction here, if the department chooses to purchase its own power, using the purchase price to pay for the generating facilities; and we find nothing in the Burns-Porter Act which requires that the department acquire the power to run its pumps in any particular fashion.

QUESTION NO. 3

If revenue bonds were issued, pledging revenues received from water users attributable to the cost of providing such power, would the pledge of such revenues be legally enforceable?

OPINION NO. 3

We think that if such bonds were issued with such revenues so pledged, the pledge would be enforceable by the bondholders.

ANALYSIS NO. 3

The state is bound by the obligations of its bond contract with its bondholders according to the terms and tenor of the contract (*Reis v. State*, 133 Cal. 593, 599). Further, with particular respect to the C.V.P. Act, a bondholder is authorized by statute to require and compel by mandamus or other appropriate proceedings the performance of any of the duties imposed upon any department, officer or employee in connection with the collection, deposit, application, and disbursement of all revenues derived from the operation and use of the project (subd. (b). Sec. 11708).

Therefore, we think a holder of a revenue bond may enforce the states obligations under the terms of a C.V.P. Act revenue bond contract. Thus, if a bond contract so pledged revenues received from water users attributable to the cost of providing power to pump water, the pledge would be enforceable.

Very truly yours,

GEORGE H. MURPHY
Legislative Counsel

By SHERWIN C. MACKENZIE, JR.
Deputy Legislative Counsel

IIb. Diversion of Tidelands Oil and Gas Revenues

LEGISLATIVE COUNSEL OF CALIFORNIA
Sacramento, California, November 28, 1967

HONORABLE GORDON COLOGNE
Senate Chamber

STATE WATER RESOURCES DEVELOPMENT—#26927

Dear Senator Cologne:

QUESTION

May the Legislature enact legislation "diverting" to the Central Valley Water Project Construction Fund the Long Beach tidelands oil and gas revenues which under existing law accrue to the California Water Fund?

OPINION

In our opinion the Legislature may enact legislation "diverting" to the Central Valley Water Project Construction Fund the Long Beach tidelands oil and gas revenues which under existing law accrue to the California Water Fund.

ANALYSIS

Chapter 7 (commencing with Section 12900) of Part 6 of Division 6 of the Water Code * creates the California Water Fund. Section 12912 of that chapter specifies the revenues which, under present law, are required to be deposited in the California Water Fund. Under subdivision (d) of Section 12912, these revenues include certain Long Beach tidelands oil and gas revenues received by the state pursuant to the provisions of Chapter 29, Statutes of 1956, First Extraordinary Session. The provisions of Chapter 29 relating to the disposition of the Long Beach tidelands oil and gas revenues received by the state were superseded by Chapter 138 of the Statutes of 1964, First Extraordinary Session, so that under Chapter 138 only the first \$11,000,000 of such revenues received by the state each year is deposited in the California Water Fund (see Secs. 9 and 12 of Ch. 138). The remainder of such revenues is deposited in various funds and available for various purposes (see Chs. 12 and 155, Stats. 1966 (1st Ex. Sess.); Ch. 1679, Stats. 1967).

Section 12938 of the Water Code, as contained in the California Water Resources Development Bond Act (Secs. 12930-12944, hereafter referred to as the "Burns-Porter Act") provides, in part, as follows:

"12938. Any money in the California Water Fund . . . available for expenditure for the State Water Resources Development System shall be used for the construction of the State Water Facilities in lieu of the proceeds of bonds authorized by this chapter. . . .

"All moneys in the California Water Fund and all accruals thereto are hereby appropriated to the department for expendi-

* All section references are to the Water Code.

ture and allocation by the department without regard to fiscal year for the State Water Resources Development System as defined in Section 12931 except that in any fiscal year the Legislature may appropriate for any lawful purpose any money in the California Water Fund which is unexpended at the beginning of that fiscal year and any money accruing to that fund during the fiscal year."

The Burns-Porter Act was submitted to the voters and was approved at the general election held on November 8, 1960. (See, Statement of Vote for Election of Nov. 8, 1960, issued by Secretary of State, p. 23; Stats. 1959, Ch. 1762.) It is well settled that the voters' approval of a bond issue creates an obligation in the nature of a contract that must be respected, and a material departure from the proposition as voted will not be upheld (see *Golden Gate Bridge etc. Dist. v. Felt* (1931), 214 Cal. 308, 339; *Skinner v. City of Santa Rosa* (1895), 107 Cal. 464; *Peery v. City of Los Angeles* (1922), 187 Cal. 753, 767; *O'Farrell v. County of Sonoma* (1922), 189 Cal. 343, 348).

The question then presented is whether or not the provisions governing the deposit of certain revenues in the California Water Fund became a part of the "contract" approved by the voters in 1960.

Initially, it should be noted that there is nothing in the Burns-Porter Act which would specifically preclude the Legislature from enacting legislation which would require certain revenues now deposited in the California Water Fund to be deposited instead in the Central Valley Water Project Construction Fund. Moreover, the Burns-Porter Act does not incorporate by reference the provisions relating to the deposit of certain revenues in the California Water Fund, although the act does specifically incorporate certain provisions relating to the Central Valley Project (Sec. 12931). Thus, there is no direct indication that the Burns-Porter Act, as approved by the people, was intended to incorporate and thus freeze the provisions relating to the deposit of certain revenues in the California Water Fund as part of the contract between the voters and the state.

As already noted, the Legislature, by the enactment of Chapter 138 of the Statutes of 1964, First Extraordinary Session, has already "diverted" all but \$11,000,000 annually of the Long Beach tidelands oil and gas revenues received by the state. Also, by the enactment of Chapter 155 of the Statutes of 1966, First Extraordinary Session, the Legislature has "diverted" all of the money which, at the time of the enactment of the Burns-Porter Act, was required to be deposited in the California Water Fund pursuant to subdivision (b) of Section 6816 of the Public Resources Code (revenues from sales and leases of state lands).

It is true that by such diversions the Legislature has diminished the amount of money available for the construction of the State Water Facilities. In this connection, however, it should be noted that the Legislature now has the power to annually appropriate California Water Fund money for purposes other than the State Water Facilities, and thus the Legislature may in this way diminish the amount of money in the fund. This provision was in the Burns-Porter Act when it was adopted by the people.

In our opinion, therefore, the Legislature may enact legislation requiring tidelands oil and gas revenues now deposited in the California Water Fund to be instead deposited in the Central Valley Water Project Construction Fund.

Very truly yours,

GEORGE H. MURPHY
Legislative Counsel

By THOMAS D. WHELAN
Deputy Legislative Counsel

IIc. Use of Bond Offset Funds

LEGISLATIVE COUNSEL OF CALIFORNIA
Sacramento, California, December 14, 1967

HONORABLE GORDON COLOGNE
P.O. Drawer 1270
Indio, California 92201

STATE WATER RESOURCES DEVELOPMENT—#27628

Dear Senator Cologne:

QUESTION

You have asked with regard to the California Water Resources Development Bond Act (Ch. 8 (commencing with Sec. 12930), Pt. 6, Div. 6, Wat. C., also known as the "Burns-Porter Act") whether the Legislature could provide for the use of bond proceeds subject to the so-called "bond offset provision" in Section 12938 of the Water Code * for the construction of facilities included within the State Water Facilities.

OPINION AND ANALYSIS

The Burns-Porter Act was submitted to the voters and was approved at the general election held on November 8, 1960. (See Statement of Vote for Election of Nov. 8, 1960, issued by Secretary of State, p. 23; Stats. 1959, Ch. 1762.) It is well settled that the voters' approval of a bond issue creates an obligation in the nature of a contract that must be respected, and a material departure from the proposition as voted will not be upheld (see *Golden Gate Bridge etc. Dist. v. Felt* (1931), 214 Cal. 308, 339; *Skinner v. City of Santa Rosa* (1895), 107 Cal. 464; *Peery v. City of Los Angeles* (1922), 187 Cal. 753, 767; *O'Farrell v. County of Sonoma* (1922), 189 Cal. 343, 348).

The Burns-Porter Act provides for the issuance of \$1,750,000,000 of general obligation bonds, primarily to assist in financing the State Water Facilities which are specified in subdivision (d) of Section 12934 of the Water Code. The act also requires money in the California Water Fund (not appropriated by the Legislature for other purposes) to be expended on the State Water Facilities (Sec. 12938, Wat. C.). Under the so-called "bond offset provision" in Section 12938, to the extent that money is expended from the California Water Fund for construction of the State Water Facilities, bond proceeds are appropriated and required to be expended for the construction of certain "additional facilities" of the State Water Resources Development System.

* The "bond offset" provision is the following:

"12938. . . . To the extent that money is expended from the California Water Fund for construction of the State Water Facilities, proceeds from the sale of bonds authorized pursuant to this act in an equal amount, is appropriated and shall be expended for the construction of such additional facilities of the State Water Resources Development System as the department shall determine to be necessary and desirable to meet local needs, including, but not restricted to, flood control, and to augment the supplies of the water in the Sacramento-San Joaquin Delta from multiple purpose dams, reservoirs, aqueducts and appurtenant works in the watersheds of the Sacramento, Eel, Trinity, Mad, Van Duzen and Klamath Rivers for use in the State Water Resources Development System, . . ."

In our opinion the use of such bond proceeds for the construction of the State Water Facilities, instead of the specified "additional facilities," would clearly constitute a material departure from the bond act as voted by the people. The Legislature, therefore, would, in our opinion, be precluded from providing for the use of bond proceeds subject to the so-called "bond offset provision" in Section 12938 for the construction of facilities included within the State Water Facilities.

Very truly yours,

GEORGE H. MURPHY
Legislative Counsel

By THOMAS D. WHELAN
Deputy Legislative Counsel

IId. Expenditures from California Water Fund

LEGISLATIVE COUNSEL OF CALIFORNIA
Sacramento, California, February 20, 1968

HONORABLE GORDON COLOGNE
Senate Chamber

WATER RESOURCES DEVELOPMENT—#2527

Dear Senator Cologne:

QUESTION

You have asked whether, under the California Water Resources Development Bond Act (Ch. 8 (commencing with Sec. 12930), Pt. 6, Div. 6, Wat. C.,* hereafter referred to as the "bond act"), moneys in the California Water Fund which are available for expenditure for the State Water Resources Development System must continue to be used solely for the construction of the State Water Facilities after all of the bonds authorized by the bond act have been issued and the proceeds therefrom expended.

OPINION

In our opinion such moneys in the California Water Fund would not be required under the bond act to be used solely for the construction of the State Water Facilities after all of the bonds authorized by the bond act have been issued and the proceeds therefrom expended.

ANALYSIS

Section 12938, as contained in the bond act, provides, in part, as follows:

"12938. . . . Any money in the California Water Fund, and any surplus revenue as described in Section 12937(b) 4, available for expenditure for the State Water Resources Development System shall be used for the construction of the State Water Facilities *in lieu of the proceeds* of bonds authorized by this chapter. The use of the proceeds of bonds for such construction shall be decreased by an amount equal to that hereafter expended from the California Water Fund for the construction of State Water Facilities. . . . All moneys in the California Water Fund and all accruals thereto are hereby appropriated to the department for expenditure and allocation by the department without regard to fiscal years for the State Water Resources Development System as defined in Section 12931 except that in any fiscal year the Legislature may appropriate for any lawful purpose any money in the California Water Fund which is unexpended at the beginning of that fiscal year and any money accruing to that fund during the fiscal year." (Emphasis added)

Section 12938 appropriates all moneys in the California Water Fund and all accruals thereto to the Department of Water Resources for

* All section references are to the Water Code.

expenditure and allocation by the department for the State Water Resources Development System, but requires such moneys to be used for the construction of the State Water Facilities in lieu of bond proceeds.

As the State Water Resources Development System includes the State Water Facilities, as well as certain additional facilities (see Sec. 12931), we think it is clear that moneys in the California Water Fund, which are not appropriated for another lawful purpose pursuant to Section 12938, *may* continue to be used for the construction of the State Water Facilities after all bond proceeds have been expended. Section 12938, however, only *requires* the use of such moneys for construction of the State Water Facilities *in lieu of* the proceeds of bonds authorized by the bond act. If such bond proceeds are no longer available, the moneys in the California Water Fund could not be expended in lieu of such proceeds.

In our opinion, after all bond proceeds have been expended, the provision of Section 12938 which *requires* the use of all moneys in the California Water Fund for construction of the State Water Facilities *in lieu of* bond proceeds would become ineffective, and, therefore, such moneys would not be *required* in such case to be expended for such construction, but could be expended for any facilities of the State Water Resources Development System.

Very truly yours,

GEORGE H. MURPHY
Legislative Counsel

By Thomas D. Whelan
Deputy Legislative Counsel

III. PERIPHERAL CANAL

Illa. Letter from R. J. Pafford, Jr., to
William E. Warne

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Dec. 20, 1965

MR. WILLIAM E. WARNE, Director
Department of Water Resources
State of California
P. O. Box 388
Sacramento, California

Dear Mr. Warne:

This letter is intended to serve as a basis for an anticipatory agreement for Federal-State cooperation in the location, design, construction, operation and financing of the proposed Peripheral Canal in the Sacramento-San Joaquin River Delta as a joint facility serving the purposes of the Federal Central Valley Project and the State Water Project. Except for the item on the agency to operate the Peripheral Canal, the following paragraphs essentially represent results to date of the Peripheral Canal Task Force, which has carefully considered the many aspects of the proposed joint Federal-State facility. Their efforts have clarified the acceptability of the Peripheral Canal, the urgency of its implementation and a basis for joint Federal-State participation. In my view, the promptness with which the Task Force executed its assignment is commendable.

Beginning with the anticipatory agreement of May 16, 1960 between the U. S. Bureau of Reclamation and the California Department of Water Resources to provide for coordinated operation of the Federal Central Valley Project and the State Water Project, positive steps have been taken in the mutual interest of the projects to provide widespread benefits to the public. A notable recent example includes the joint facilities now under construction as part of the San Luis Unit of the Central Valley Project. We recognize the desirability of continuing joint participation in water conservation facilities that mutually serve the water users of the Central Valley Project and the State Water Project.

Local people of the Sacramento-San Joaquin Delta made representations before the Congress which resulted in the Bureau of Reclamation initiating the Sacramento-San Joaquin Delta investigation. As a result, the Bureau of Reclamation now advocates the construction of a Peripheral Canal to assure the maintenance of an acceptable environment within the Sacramento-San Joaquin Delta and to provide necessary water transfer services for the Federal Central Valley Project and the State Water Project.

Earlier plans for the main features of the Central Valley Project by the Bureau of Reclamation included construction of a 50-mile channel rather than the stop-gap Delta Cross Channel now in operation. Undertaking the long-delayed construction of adequate conveyance facilities at this time is subject, of course, to appropriate implementing action by the Congress. This should include the desired authorization of construction of this feature as a joint-use facility.

The California Departments of Water Resources, Fish and Game, Parks and Recreation have each made extensive studies in the Delta which support the Peripheral Canal Plan. Also, the California Department of Fish and Game, in its Third Annual Report of the Delta Fish and Wildlife Protection Study, found that the Peripheral Canal Plan was the only plan that fully protected and provided opportunities for enhancement of fish and wildlife resources of the Delta.

The Interagency Delta Committee, comprised of members from the California Department of Water Resources, the U. S. Bureau of Reclamation and the U. S. Corps of Engineers, after examining all proposed alternative plans of the Sacramento-San Joaquin Delta, resolved that the Peripheral Canal was the most desirable.

Our offices concur that the Peripheral Canal Plan is the most acceptable concept of accomplishing a solution to the Sacramento-San Joaquin Delta problems.

A proposed feasibility report by the Bureau of Reclamation on the Peripheral Canal as an addition to the Federal Central Valley Project is scheduled for completion in January of 1966. Benefits from the Peripheral Canal will result from delivery of approximately 5 million acre-feet of water annually for the Federal Central Valley Project and approximately 4 million acre-feet for the State Water Project.

Requirements for water service from the State Water Project make an operable Peripheral Canal necessary by 1974. The California Department of Water Resources, under the Burns-Porter Act, has authority to construct its share of the Peripheral Canal as part of the State Water Project.

Cost savings to the United States and the State of California may be effected by coordinating the construction of the proposed Peripheral Canal with proposed Interstate Highway 5 (Westside Freeway). This cooperative effort involves consideration of joint alignment, coordination of right-of-way procurement, and utilizing material borrowed from portions of the Peripheral Canal in the construction of the Interstate Highway. To realize the cost savings it will be necessary for the right-of-way for the Canal to be obtained not later than December 1968.

In the interest of expeditiously implementing the Peripheral Canal and upon your concurrence with this letter, our offices agree that:

- (1) The Bureau of Reclamation will expedite the completion of the feasibility studies and report on the Peripheral Canal as a proposed addition to the Federal Central Valley Project.

- (2) The California Department of Water Resources will carry out all steps within its power to expedite and assist in appropriate reviews of the completed feasibility report.

- (3) The Peripheral Canal will provide for conveyance of Central Valley Project and State Water Project waters through the Delta. The

capacity of the Peripheral Canal will be approximately 22,000 second-feet, including a capacity of 10,300 second-feet available for the Department to its Delta Pumping Plant. The Peripheral Canal shall consist of those features outlined in the Interagency Delta Committee's report of January 1965. These features and the canal alignment proposed in the Interagency Delta Committee's report may be modified by mutual agreement as detailed planning, design and alignment studies proceed.

(4) Benefits from the Peripheral Canal will occur in the ratio equal to that of the water to be delivered annually for the two projects; that is, approximately 5 million acre-feet of water delivered annually for the Federal Central Valley Project and approximately 4 million acre-feet delivered annually for the California State Water Project (as shown in Tables A and B attached hereto).

(5) The two agencies will seek the construction of the Peripheral Canal as a facility to assure the maintenance and enhancement of an environment in the Sacramento-San Joaquin Delta with resulting widespread benefits for water quality, fish and wildlife resources and recreation.

(6) The State of California, upon issuance of a letter of concurrence, would assume the burden for payment of all the State share of the properly allocated costs to recreation and fish and wildlife enhancement. The tentative cost allocation and cost sharing proposal is shown diagrammatically on Chart I attached.

(7) Reimbursable costs, except those costs allocated to recreation, will be shared by the State of California and the United States in proportion to benefits (namely $\frac{5}{9}$ of such reimbursable costs will be chargeable to the Federal Central Valley Project and $\frac{4}{9}$ of such reimbursable costs will be chargeable to the California State Water Project). A tentative cost allocation and cost sharing proposal is shown diagrammatically on Chart I attached.

(8) The State of California, upon issuance of a letter of concurrence, would assume the administration of all land and water areas of the Peripheral Canal for recreation and fish and wildlife purposes consistent with water transfer operations of the Canal.

(9) The Peripheral Canal will be designed, constructed, operated and maintained as a Federal-State joint-use facility in accordance with detailed terms and conditions to be agreed upon by the Bureau of Reclamation and the Department of Water Resources.

(10) If either of the two agencies desire to convey more water than the presently planned amounts, they may do so provided the canal capacity is available and provided they pay for the operational and maintenance costs of transporting the additional water.

(11) Annual operation and maintenance costs, other than those for recreation, shall be shared by the State and the United States in proportion to the quantity of water made available to the State for the service areas listed in Table A and to the United States for the service areas listed in Table B for each such year. A tentative allocation of all annual costs and the contemplated cost sharing is shown diagrammatically on Chart II attached.

(12) The two agencies will jointly endeavor to assure that the implementation of the Peripheral Canal will meet the following general schedule:

(a) Completion of the Bureau of Reclamation proposed feasibility report for a Peripheral Canal as an addition to the Federal Central Valley Project by January 1966.

(b) Presentation to the Congress with a request for authorization, in calendar year 1966, of the Peripheral Canal Unit as an addition to the Federal Central Valley Project. Such authorization shall seek to empower the Secretary of the Interior, on behalf of the United States, to negotiate and enter into an agreement with the State of California providing for coordinated construction, operation and maintenance of the Peripheral Canal as a joint-use facility.

(c) Completion of alignment studies for the Peripheral Canal by January 1967.

(d) Completion of take lines for reaches of the canal where mutual cost savings may be realized through cooperation in the alignment and construction of the Peripheral Canal and the Westside Freeway by November 1966.

(e) Completion of take lines for the north reach of the Peripheral Canal from the Sacramento River to the San Joaquin River (not covered by item d above) by January 1967.

(f) Completion of take lines for the south reach of the Peripheral Canal from the San Joaquin River to Clifton Court Tract by March 1967.

(g) Provision to the Division of Highways of necessary rights in agreed reaches of the canal for the purpose of obtaining borrow material for the construction of the Westside Freeway by November 1968.

(h) Completion of construction of the Peripheral Canal to a degree sufficient to allow initial operation by January 1974.

(13) In order to proceed expeditiously and jointly with the task of detailed alignment studies, public hearings, and related detail respecting an acceptable route of the Peripheral Canal, the Bureau of Reclamation and the Department of Water Resources will immediately assign appropriate personnel to an alignment study committee, to work out detailed terms necessary to implement the general schedule of completion presented above and to coordinate this work. Representatives from the California Department of Parks and Recreation and Fish and Game and the United States Bureau of Outdoor Recreation and Bureau of Sport Fisheries and Wildlife will be invited to participate on the committee. Appropriate subcommittees may be established to work with the alignment committee as necessary for this purpose.

(14) Upon completion of the alignment studies and the adoption of right-of-way take lines, the State shall proceed with right-of-way acquisition for the joint project facilities. The Bureau shall appoint a representative to work with the State on this matter.

(15) Concurrent with right-of-way acquisition and immediately after authorization by the Congress and appropriation of funds, the Bureau of Reclamation shall proceed with the final design and specifications for the joint project. The State shall appoint a representative to work with the Bureau as necessary in this matter.

(16) Upon completion of final design and specifications of the joint project facilities to the mutual satisfaction of the Bureau and the Department, and upon possession of adequate right-of-way, the Bureau of Reclamation shall proceed with construction of the project facilities to maintain the general schedule of completion, in accordance with detailed terms and conditions to be mutually agreed upon.

(17) A Recreation and Fish and Wildlife Committee will be established for the purpose of advising and assisting the Bureau and the Department on matters involving canal alignment, land acquisition, design, construction, and operation of the facilities as they may relate to recreation and fish and wildlife. This Committee will include representatives from California Departments of Parks and Recreation, Fish and Game, and Water Resources; and from the United States Bureau of Reclamation, Bureau of Outdoor Recreation and Bureau of Sport Fisheries and Wildlife.

(18) After completion of construction, the joint Peripheral Canal facilities, exclusive of the recreation facilities, will be operated and maintained by the Bureau of Reclamation in accordance with detailed terms and conditions to be agreed upon by the Bureau and the Department.

Sincerely yours,

R. J. PAFFORD, JR.
Regional Director

Attachment

TABLE A
STATE DEPARTMENT OF WATER RESOURCES

<i>Service Area</i>	<i>AF/An,</i>
South Bay -----	188,000
San Joaquin Valley -----	1,351,000
Central Coast -----	83,000
Southern California -----	2,478,000
Total -----	4,100,000

TABLE B
UNITED STATES BUREAU OF RECLAMATION

Delta-Mendota -----	1,675,000
San Felipe -----	300,000
Contra Costa County -----	440,000
San Luis -----	1,280,000
Delta Uplands and Lowlands -----	1,340,000
Total -----	5,035,000

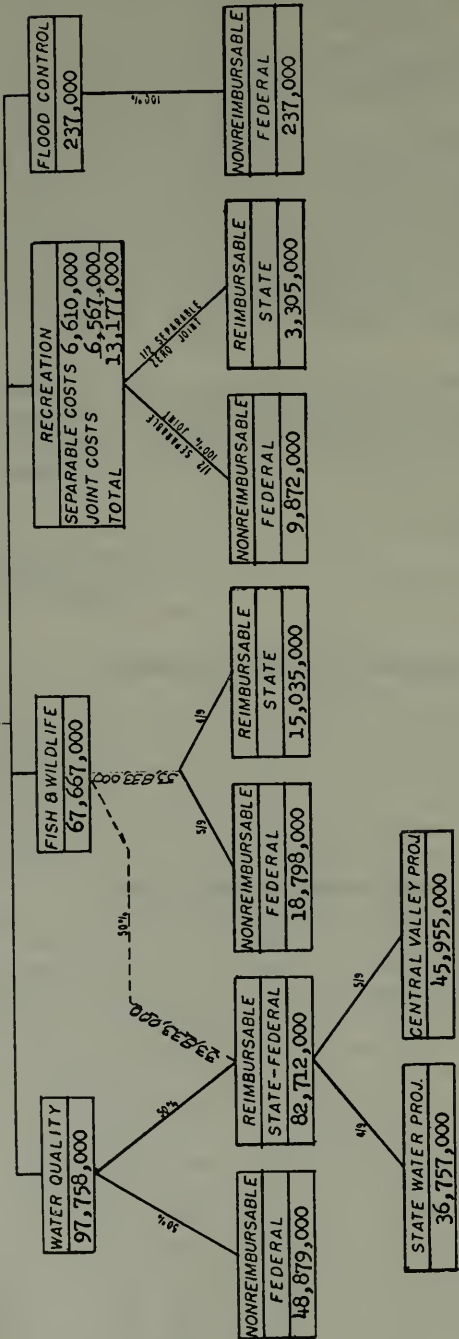
CHART I

(Preliminary - subject to revision)

PERIPHERAL CANAL
COST ALLOCATION AND REPAYMENT

Unit value: dollars

TOTAL ALLOCATION
178,839,000



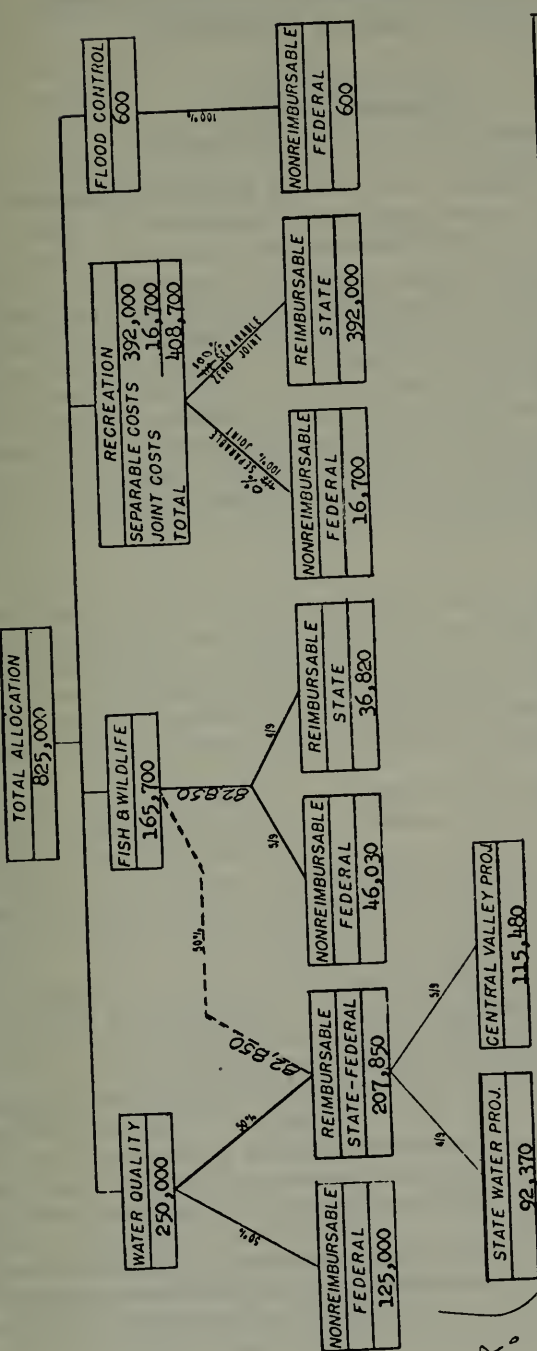
ITEM	Water Quality	Fish & Wildlife	Recreation	Subtotal Fish and Recreation	Flood Control	Total	Percent
REIMBURSABLE							
State Water Project	36,757,000	--	--	--	--	36,757,000	
State (General)	--	15,035,000	3,305,000	(18,340,000)	--	18,340,000	
Central Valley Project	45,955,000	--	--	--	--	45,955,000	
SUBTOTAL	82,712,000	15,035,000	3,305,000	(18,340,000)	--	101,052,000	57
NONREIMBURSABLE							
Federal (General)	48,879,000	18,799,000	9,872,000	(28,671,000)	237,000	77,787,000	43
TOTAL	131,591,000	33,834,000	13,177,000	(47,011,000)	237,000	178,839,000	100

CHART II

(Preliminary - subject to revision)

PERIPHERAL CANAL
ANNUAL OPERATION, MAINTENANCE & REPLACEMENT COST

Unit value: dollars



ITEM	Water Quality	Fish & Wildlife	Recreation	Subtotal Fish and Recreation	Flood Control	Total	Percent
REIMBURSABLE							
State Water Project	92,370	--	--	--	--	92,370	
State (General)	--	36,820	392,000	(428,820)	--	428,820	
Central Valley Project	115,480	--	--	--	--	115,480	
SUBTOTAL	207,850	36,820	392,000	(428,820)	--	636,670	77
NONREIMBURSABLE							
Federal (General)	125,000	46,030	16,700	(62,730)	600	188,330	23
TOTAL	332,850	82,850	408,700	(491,550)	600	825,000	100

IIlb. Agreement Between the United States and the State of California

**STATE OF CALIFORNIA
THE RESOURCES AGENCY**

DEPARTMENT OF WATER RESOURCES

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE STATE OF CALIFORNIA RELATING TO THE PERIPHERAL CANAL

THIS AGREEMENT, entered into as of this 16th day of November, 1966, pursuant to the Act of Congress of June 17, 1902, (32 Stat. 388) and acts amendatory thereof and supplementary thereto, and particularly the Act of Congress of March 4, 1921, (41 Stat. 1404) between THE UNITED STATES OF AMERICA, herein styled the "United States", acting through the Bureau of Reclamation, Department of the Interior, herein styled the "Bureau", represented by the officer executing this contract, his duly appointed successor, or duly authorized representative, herein styled the "Contracting Officer", and the STATE OF CALIFORNIA, acting by and through its Department of Water Resources, herein styled the "State".

WITNESSETH THAT:

WHEREAS, by reason of the common purpose of the Federal Central Valley Project and the State Water Project to develop the water resources of the State and provide widespread benefits to the people of California and the United States, it is in the mutual interest of the United States and the State that the Bureau and the State participate jointly in the development of water facilities that mutually serve the two projects; and

WHEREAS, beginning with the agreement of May 16, 1960, between the Bureau and the State to provide for coordinated operation of the Federal Central Valley Project and the State Water Project, positive steps have been taken in the mutual interest of such projects to provide widespread benefits to the public, a notable example of which are the joint facilities now under construction as part of the San Luis Unit of the Federal Central Valley Project; and

WHEREAS, the Bureau and the State recognize the desirability of continuing such joint participation in the development of water conservation facilities that mutually serve the water users of the Federal Central Valley Project and the State Water Project; and

WHEREAS, the Interagency Delta Committee, comprised of members of the State, the Bureau and the United States Corps of Engineers, after examining all proposed alternative plans designed to solve the water transfer problems of the Sacramento-San Joaquin Delta (the Delta) resolved that the Peripheral Canal was the most desirable plan; and

WHEREAS, the Bureau and the State agree that the Peripheral Canal plan is the most acceptable concept to achieve a solution to such problems and to maximize opportunities for the enhancement of fish and wildlife in the Delta; and

WHEREAS, the State under the Central Valley Project Act (Part 3, Div. 6 of the Water Code) and the State Water Resources Development Bond Act (Ch. 8, Div. 6 of the Water Code), and particularly under Sections 11260 and 12934 (d) (3) of the Water Code, is authorized to construct the Delta Water Facilities as a part of the State Water Project and commitments of the State regarding such project require that the Delta Water Facilities be operable by 1974; and

WHEREAS, the State has adopted the Peripheral Canal plan as the Delta Water Facilities; and

WHEREAS, under Section 11500 of the Water Code, and State is authorized to enter into contracts with the United States for the construction or financing of the Central Valley Project; and

WHEREAS, under Section 12895 of the Water Code, the State is also authorized to participate and cooperate with the United States in the planning of construction and financing of projects that are in substantial conformity with the California Water Plan; and

WHEREAS, cost savings to the United States and the State may be realized by coordinating the construction of the proposed Peripheral Canal with proposed Interstate Highway 5 (Westside Freeway) and such effort involves consideration of joint alignment, coordination of right-of-way procurement and utilization of borrow material from portions of the Peripheral Canal in the construction of such highway; and

WHEREAS, the State is presently conducting the advanced planning and alignment studies that are necessary to meet its schedule to implement selection of final canal alignment and right-of-way requirements by 1968; completion of the canal by 1974; completion of right-of-way acquisition lines for reaches of the canal where mutual cost savings may be realized by June 1967; completion of right-of-way acquisition lines for the north reach of the Peripheral Canal from the Sacramento River to the San Joaquin River (not included above) by September 1968; completion of right-of-way acquisition lines for the south reach of the Peripheral Canal from the San Joaquin River to Clifton-Court Tract by September 1967.

WHEREAS, the Bureau has prepared a proposed feasibility report dated April 1966 covering the proposed Peripheral Canal Unit, Delta Division, Central Valley Project and entitled "A Report on Feasibility of Water Transfer in the Sacramento-San Joaquin Delta"; and

WHEREAS, in furtherance of the coordinated effort in the construction of the Peripheral Canal, the parties desire that the United States shall immediately begin to cooperate and consult with the State and review such studies being conducted by the State to assure that the aforementioned needs of the Federal Central Valley Project and the State Water Project are met;

Now, THEREFORE, it is agreed as follows:

1. The Peripheral Canal shall consist of features generally as outlined in the Bureau's proposed feasibility report on the Peripheral Canal dated April 1966. The features and the canal alignment proposed in such report may be modified by mutual agreement as detailed planning, design and alignment studies become available.

2. The Peripheral Canal is planned to be a federal-state joint-use facility and costs of such facility are planned to be allocated generally

in accordance with the preliminary cost allocation and cost sharing proposal outlined in the Bureau's proposed feasibility report on the Peripheral Canal dated April 1966.

3. During fiscal year 1967, the State shall continue the alignment studies and the Bureau study and review the work in progress including but not limited to the following general categories:

- a. Advance Planning.
- b. Mapping.
- c. Exploration.
- d. Design (preliminary).

The details of the work to be done by the State and reviewed by the Bureau shall be developed by additional discussions and agreements.

4. The State, upon execution and approval of this agreement, shall deposit with the Bureau such sums of money as the Bureau estimates, in writing, will be required to pay the cost of such services described in paragraph 3 above performed by the Bureau during the first half of fiscal year 1967. Prior to ten (10) days preceding the next and succeeding quarters of such year, the Bureau shall furnish the State an estimate, in writing, of the sums required for its services during the respective quarter: *Provided*, That the total of such sums advanced during such year shall not exceed \$97,500. In the event the Peripheral Canal is authorized as a unit of the Federal Central Project, the monies so advanced shall be credited to the State as a portion of the total share of the State in the cost of construction of the Peripheral Canal in accordance with such authorizing act.

5. The United States shall make available to the State for inspection cost records of all expenditures made by it from funds advanced by the State under this agreement.

6. The Bureau shall make and furnish to the State reports of the results of its study and review of the work in progress as soon as practicable after completion of such services. The number of copies to be furnished will be as mutually agreed upon by the parties.

7. All work hereunder shall cease at the option of the State when and if the funds advanced by the State shall have been expended without regard to whether or not the work contemplated herein to be performed by the Bureau shall have been completed.

8. This agreement may be terminated by either party by giving thirty (30) days written notice to the other.

9. Any unexpended or unobligated balance of such deposit or deposits remaining on July 1, 1967, or on prior termination of the agreement, shall be returned to the State.

10. The State warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the State for the purpose of securing business. For breach or violation of this warranty the United States shall have the right to annul this contract without liability or

in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

11. The waiver of a breach of any of the provisions hereof shall not be deemed to be a waiver of any other provision hereof or subsequent breach of such provision.

12. No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

IN WITNESS WHEREOF, the parties hereto have executed this contract on the date first above written.

STATE OF CALIFORNIA
THE RESOURCES AGENCY
DEPARTMENT OF WATER RESOURCES

THE UNITED STATES OF AMERICA

By /s/ WILLIAM E. WARNE

Director

Date November 16, 1966

APPROVED AS TO LEGAL
FORM AND SUFFICIENCY :

/s/ ROBERT W. JAMES

for P. A. Towner, Chief Counsel
Department of Water Resources

Date 11-16-66

By /s/ C. H. KADIE

Acting Regional Director, Region 2
Bureau of Reclamation

Date 11-16-66

APPROVED AS TO LEGAL
FORM AND SUFFICIENCY :

/s/ RITA SINGER

For the Regional Solicitor
Department of the Interior

Date November 16, 1966

NOTE: This agreement never became effective as it was subsequently disapproved by Department of General Services.

IV. STATE WATER PROJECT CONSTRUCTION COSTS
AS PROPOSED JUNE 30, 1960

STATE WATER PROJECT CONSTRUCTION COSTS
AS PROPOSED JUNE 3, 1960
(in thousands of dollars)

<i>Feature</i>	<i>Proposed Cost</i>
Upper Feather River Features	
Frenchman Dam and Reservoir-----	2,504
Abbey Bridge Dam, Dixie Refuge Dam, and Antelope Valley Dam-----	4,721
Grizzly Valley Reservoir and Dam-----	2,100
Subtotal—Upper Feather River Features-----	9,325
Oroville Features	
Main Dam-----	145,086
Spillway and Outlet Structure-----	14,605
Powerplant-----	88,376
Diversion Dam-----	9,478
Thermalito Power Canal-----	11,600
Thermalito Powerplant-----	27,650
Thermalito Forebay and Afterbay-----	4,392
Permanent Buildings and Roads-----	1,446
Fish Hatchery-----	660
Relocate Western Pacific Railroad and U. S. Highway 40A-----	59,333
Relocations (excluding Western Pacific Railroad and Highway 40A)-----	22,763
Acquisition, Big Bend Powerplant-----	27,305
Rights-of-Way (not included above)-----	11,445
Subtotal—Oroville Features (State and Federal)-----	424,139
Subtotal—Federal Flood Control Allocation-----	75,000
Subtotal—Oroville Features Less Federal Flood Control Allocation-----	349,139
Delta Unit Features	
Master Levee System-----	64,604
Structures-----	15,878
Substitute Water Supply Facilities-----	5,921
Subtotal—Delta Unit (State and Federal)-----	86,403
Subtotal—Federal Flood Control Allocation-----	30,000
Subtotal—Delta Unit Less Federal Flood Control Allocation-----	56,403
North Bay Aqueduct Features	
Intake Channel and Fish Screen Facilities-----	702
Calhoun Cut Pumping Plant-----	440
Aqueduct—Calhoun Cut Pumping Plant to Cordelia Pumping Plant-----	4,380
Cordelia Pumping Plant and Discharge Pipe-----	1,257
Aqueduct—Cordelia Pumping Plant to Napa Valley Siphon-----	6,950
Aqueduct—Napa Valley Siphon to Sonoma Valley Siphon-----	3,060
Aqueduct—Sonoma Valley Siphon to Petaluma Valley Siphon-----	3,700
Aqueduct—Petaluma Valley Siphon through Novato Reservoir-----	1,565
Rights-of-Way-----	2,660
Subtotal—North Bay Aqueduct Features-----	24,714

<i>Feature</i>	<i>Proposed Cost</i>
South Bay Aqueduct Features	
Intake Canal and Bethany Forebay-----	210
Pumping Plants, Discharge Lines, and Surge Tank-----	2,630
Aqueduct—South Bay Pumping Plant to Patterson Reservoir---	4,073
Aqueduct—Patterson Reservoir to Del Valle Reservoir-----	1,715
Del Valle Dam and Reservoir (State)-----	6,282
Del Valle Dam and Reservoir (Federal)-----	4,500
Del Valle Booster Pumping Plant-----	539
Livermore Canal-----	536
La Costa Tunnel-----	1,452
Sunol Siphon and Mission Pipeline-----	8,197
Mission Tunnel-----	1,771
Airpoint Dam and Reservoir-----	3,447
Doolan Canal and Pipeline-----	2,028
Doolan Dam and Reservoir-----	2,383
Miscellaneous-----	2,928
Rights-of-Way-----	3,001
Subtotal—South Bay Aqueduct Features (State and Federal)-----	45,692
Subtotal—Federal Flood Control Allocation-----	4,500
Subtotal—South Bay Aqueduct Features Less Federal Flood Control Allocation-----	41,192

SAN JOAQUIN VALLEY-SOUTHERN CALIFORNIA AQUEDUCT FEATURES

Delta to Discharge of Pumping Plant I

Intake Channel and Fish Protective Works-----	9,932
Pumping Plant I, including Penstocks-----	38,387
Rights-of-Way-----	160
Subtotal—Delta to Discharge of Pumping Plant I-----	48,479

Pumping Plant I to San Luis Forebay

Aqueduct—Pumping Plant I to Chrisman Road-----	20,143
Aqueduct—Chrisman Road to Del Puerto-----	12,733
Aqueduct—Del Puerto to Orestimba-----	14,670
Aqueduct—Orestimba to San Luis Forebay-----	19,706
Rights-of-Way-----	2,846
Subtotal—Pumping Plant I to San Luis Forebay-----	70,098

San Luis Forebay to Kettleman City

San Luis Forebay (State)-----	2,698
San Luis Forebay (Federal)-----	1,750
Intake Channel (State)-----	1,546
Intake Channel (Federal)-----	859
Pumping Plant II, including Penstocks (State)-----	57,379
Pumping Plant II, including Penstocks (Federal)-----	31,858
San Luis Dam and Reservoir (State)-----	61,264
San Luis Dam and Reservoir (Federal)-----	58,699
Rights-of-Way—San Luis Forebay-----	453
Rights-of-Way—San Luis Dam and Reservoir-----	3,354
Rights-of-Way—Outlet of San Luis Reservoir to Kettleman City	2,102
NOTE: Federal Delta-Mendota Relift Pumping Plant provides interim pumping facilities.	
Aqueduct—San Luis Reservoir to Panoche Creek (State)-----	32,198
Aqueduct—San Luis Reservoir to Panoche Creek (Federal)-----	27,965
Aqueduct—Panoche Creek to Five Points (State)-----	21,604
Aqueduct—Panoche Creek to Five Points (Federal)-----	14,261
Aqueduct—Five Points to Arroyo Pasajero (State)-----	8,010

<i>Feature</i>	<i>Proposed Cost</i>
San Luis Forebay to Kettleman City—Continued	
Aqueduct—Five Points to Arroyo Pasajero (Federal)-----	1,991
Aqueduct—Arroyo Pasajero to Kettleman City (State)-----	9,500
Aqueduct—Arroyo Pasajero to Kettleman City (Federal)-----	968
Preconsolidation—San Luis Reservoir to Panoche Creek (State)-----	974
Preconsolidation—San Luis Reservoir to Panoche Creek (Federal)-----	324
Preconsolidation—Panoche Creek to Five Points (State)-----	2,510
Preconsolidation—Panoche Creek to Five Points (Federal)-----	1,606
Preconsolidation—Arroyo Pasajero to Kettleman City (State)-----	2,278
Preconsolidation—Arroyo Pasajero to Kettleman City (Federal)-----	228
Subtotal—San Luis Forebay to Kettleman City (State)-----	205,870
Subtotal—San Luis Forebay to Kettleman City (Federal)-----	141,009
Subtotal—San Luis Forebay to Kettleman City (State and Federal)-----	346,879
Kettleman City to Avenal Gap	
Aqueduct-----	7,264
Rights-of-Way-----	79
Subtotal—Kettleman City to Avenal Gap-----	7,343
Avenal Gap to Lost Hills	
Rights-of-Way-----	420
Canal-----	16,040
Miscellaneous-----	20
Subtotal—Avenal Gap to Lost Hills-----	16,480
Lost Hills to 6 Miles South of Lost Hills	
Rights-of-Way-----	161
Canal-----	3,433
Miscellaneous-----	5
Subtotal—Lost Hills to 6 Miles South of Lost Hills-----	3,599
6 Miles South of Lost Hills to Elk Hills Road	
Rights-of-Way-----	482
Preconsolidation-----	8,215
Canal-----	12,239
Miscellaneous-----	15
Subtotal—6 Miles South of Lost Hills to Elk Hills Road-----	20,951
Elk Hills Road to Tupman	
Rights-of-Way-----	234
Canal-----	6,734
Miscellaneous-----	6
Subtotal—Elk Hills Road to Tupman-----	6,974
Tupman to Pumping Plant III	
Rights-of-Way-----	1,320
Canal-----	8,660
Miscellaneous-----	30
Subtotal—Tupman to Pumping Plant III-----	10,010

<i>Feature</i>	<i>Proposed Cost</i>
Pumping Plant III to Basic School Road	
Rights-of-Way	508
Preconsolidation	4,792
Canal, including Headworks	6,146
Pumping Plant III, including Penstocks	10,760
Forebay, Site Development, and Miscellaneous	3,586
Subtotal—Pumping Plant III to Basic School Road	25,792
Basic School Road to Pumping Plant IV	
Rights-of-Way	902
Canal	9,073
Miscellaneous	17
Subtotal—Basic School Road to Pumping Plant IV	9,992
Pumping Plant IV to Pumping Plant VI	
Rights-of-Way	770
Preconsolidation	8,085
Canal, including Headworks	7,350
Siphon	2,680
Pumping Plant IV, including Penstocks	12,240
Pumping Plant V, including Penstocks	23,520
Forebay, Site Development, and Miscellaneous	5,070
Subtotal—Pumping Plant IV to Pumping Plant VI	59,715
Pumping Plant VI to South Portal Tehachapi Tunnels	
Rights-of-Way	70
Pumping Plant VI, including Penstocks	129,360
Tunnels Nos. 1, 2, and 3	21,170
Tunnel No. 4	28,120
Siphons	5,550
Forebay, Afterbay, Surge Basin and Site Development	4,110
Subtotal—Pumping Plant VI to South Portal Tehachapi Tunnels	188,380
Subtotal—San Joaquin Valley-Southern California Aqueduct Features (State Only)	673,683

EAST BRANCH FEATURES

South Portal Tehachapi Tunnels to Cottonwood Powerplant	
Rights-of-Way	20
Siphon	2,840
Cottonwood Power Development, including Penstocks	21,800
Tailrace, Site Development, Turnouts, and Headworks	8,410
Subtotal—South Portal Tehachapi Tunnels to Cottonwood Power- plant	33,070
Cottonwood Powerplant to Fairmont Reservoir	
Rights-of-Way	590
Canal	11,440
Siphon	840
Subtotal—Cottonwood Powerplant to Fairmont Reservoir	12,870
Fairmont Reservoir to Little Rock Creek	
Rights-of-Way	2,410
Canal	22,720
Siphon	5,180
Subtotal—Fairmont Reservoir to Little Rock Creek	30,310

<i>Feature</i>		<i>Proposed Cost</i>
Little Rock Creek to Antelope Wash		
Rights-of-Way	5,460	
Canal	19,620	
Siphon	14,160	
Pumping Plant VII and Penstocks	18,760	
Forebay and Site Development	12,660	
Miscellaneous	330	
Subtotal—Little Rock Creek to Antelope Wash		70,990
Antelope Wash to Mojave River		
Rights-of-Way	120	
Canal	2,010	
Siphon	2,960	
Subtotal—Antelope Wash to Mojave River		5,090
Mojave River to Cedar Springs Reservoir		
Rights-of-Way	20	
Siphon	9,570	
Subtotal—Mojave River to Cedar Spring Reservoir		9,590
Cedar Springs Reservoir to Devil Canyon Powerplant No. 2		
Rights-of-Way	2,540	
Cedar Springs Dam and Reservoir	19,490	
Tunnel	26,930	
Tailrace, Checks, Wasteways, Forebays, Surge Basin, Site Development, etc.	2,470	
Devil Canyon Powerplant No. 1, including Penstocks	23,910	
Devil Canyon Powerplant No. 2, including Penstocks	21,330	
Subtotal—Cedar Springs Reservoir to Devil Canyon Powerplant No. 2		96,670
Devil Canyon Powerplant No. 2 to Perris Reservoir		
Rights-of-Way	8,850	
Siphon	69,870	
Perris Dam and Reservoir	23,490	
Subtotal—Devil Canyon Powerplant No. 2 to Perris Reservoir		102,210
Subtotal—East Branch Features		360,800

WEST BRANCH FEATURES**Fairmont Diversion Features**

Rights-of-Way	240	
Tunnel	5,160	
Siphon	230	
Headworks, Turnouts, Stilling Basin, and Plant Excavation	710	
Filtration Plant	26,000	
Fairmont Pumping Plant, including Penstocks	2,210	
Elizabeth Dam and Reservoir	11,370	
Subtotal—West Branch Features		45,920

COASTAL AQUEDUCT FEATURES

<i>Feature</i>	<i>Proposed Cost</i>
Avenal Gap to Pumping Plant C-IV	
Pumping Plant C-III, including Penstocks -----	5,160
Canal -----	5,819
Las Perillas Reservoir -----	1,108
Pumping Plant C-III Site Development -----	364
Rights-of-Way -----	725
Subtotal—Avenal Gap to Pumping Plant C-IV -----	13,176
Pumping Plant C-IV to Pumping Plant C-V	
Pumping Plant C-IV, including Penstocks -----	2,640
Canal -----	1,536
Siphon -----	531
Pumping Plant C-IV Site Development -----	744
Forebay and Afterbay -----	265
Rights-of-Way -----	52
Subtotal—Pumping Plant C-IV to Pumping Plant C-V -----	5,768
Pumping Plant C-V to Pumping Plant C-VI	
Pumping Plant C-V, including Penstocks -----	1,420
Canal -----	376
Siphon -----	1,354
Pumping Plant C-V Site Development -----	405
Forebay and Afterbay -----	93
Rights-of-Way -----	93
Subtotal—Pumping Plant C-V to Pumping Plant C-VI -----	3,741
Pumping Plant C-VI to San Juan Creek	
Pumping Plant C-VI, including Penstocks -----	2,670
Siphon -----	7,509
Pumping Plant C-VI Site Development -----	369
Forebay and Afterbay -----	77
Rights-of-Way -----	103
Subtotal—Pumping Plant C-VI to San Juan Creek -----	10,728
San Juan Creek to Cammatti Road	
Siphon -----	5,758
Rights-of-Way -----	134
Subtotal—San Juan Creek to Cammatti Road -----	5,892
Cammatti Road to Santa Margarita	
Siphon -----	7,079
Rights-of-Way -----	167
Subtotal—Cammatti Road to Santa Margarita -----	7,246
Santa Margarita to San Luis Obispo	
San Luis Obispo Powerplant, including Penstocks -----	2,260
Siphon -----	5,666
Power Site Development -----	116
Forebay and Surge Tank -----	327
Rights-of-Way -----	133
Subtotal—Santa Margarita to San Luis Obispo -----	8,502

<i>Feature</i>		<i>Proposed Cost</i>
San Luis Obispo to Arroyo Grande		
Canal -----		1,566
Siphon -----		1,277
Rights-of-Way -----		396
Subtotal—San Luis Obispo to Arroyo Grande -----		3,239
Arroyo Grande to Nipomo		
Canal -----		1,373
Siphon -----		3,197
Rights-of-Way -----		578
Subtotal—Arroyo Grande to Nipomo -----		5,148
Nipomo to Santa Maria		
Canal and Terminus Structure -----		1,385
Siphon -----		1,681
Rights-of-Way -----		410
Subtotal—Nipoma to Santa Maria -----		3,476
Subtotal—Coastal Aqueduct Features -----		66,916
Local Projects -----		145,000
San Joaquin Valley Drainage Project (State Only) -----	15,731	
(Federal Only) -----	45,669	
(State and Federal) -----		61,400
Middle Fork of the Eel River Project -----		168,462
Total—State Water Project (State Only) -----		1,957,285
Total—State Water Project (Federal Only) -----		296,178
Total—State Water Project (State and Federal) -----		2,253,463

V. ANTICIPATED OR FINAL CONTRACT COST OF
COMPLETED AND ACTIVE CONTRACTS—
STATE WATER PROJECT

ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED AND ACTIVE CONTRACTS—STATE WATER PROJECT

This table is prepared in four parts, which are described by the following paragraphs. Only construction direct pay is presented. The costs are current estimates as of December 1967.

PART A.—*Contracts Issued Under the Department of Water Resources Specifications*

Part A of Table 2 presents the engineers' estimate made just prior to bid opening, the accepted low bid amount, the anticipated final cost of active contracts, or the final contract amount of completed contracts for those construction contracts issued under Department of Water Resources specifications.

PART B.—*Contracts Issued (Without a Department of Water Resources Specification Number) Under the State Office of Procurement*

This part of Table 2 relates to significant items of equipment and materials, the procurement of which is administered by the State Office of Procurement. With few exceptions, the low bid amount is the final cost of the item.

PART C.—*Contracts for Relocations*

Many existing facilities are relocated by their owners to provide right-of-way for construction of the State Water Project. Part C of Table 2 enumerates the principal agencies which have been involved in this type of activity, and the respective number of contracts and total costs of contracts between these agencies and the state to perform the relocations.

PART D.—*Contracts With Office of Architecture and Construction*

Two operation and maintenance centers were constructed for the project by Department of General Services, Office of Architecture and Construction. Their engineers' estimate, low bid, and final contract amount are presented in Part D of Table 2.

(Prepared in answer to 11/8/67 request by Senator Gordon Cologne.)

February 1968

ACTIVE OR COMPLETED CONTRACTS STATE WATER PROJECT SUMMARY (in thousands of dollars)

Division	Estimated or Final Contract Cost				
	Part A	Part B	Part C	Part D	Total
Upper Feather.....	8,347	0	0	255	8,602
Oroville.....	332,310	1,020	32,076	0	365,406
North Bay Aqueduct.....	1,737	75	14	0	1,826
South Bay Aqueduct.....	43,942	87	1,097	0	45,126
North San Joaquin.....	108,757	230	4,855	0	113,842
South San Joaquin.....	118,027	1,054	6,440	1,080	126,601
Tehachapi.....	172,581	0	9	0	172,590
Mojave.....	12,397	0	12,352	0	24,749
Santa Ana.....	23,376	0	1,210	0	24,586
West Branch.....	179,918	0	14,766	0	194,684
Coastal Branch.....	8,219	160	167	0	8,546
General.....	2,560	0	0	0	2,560
TOTAL.....	1,012,171	2,626	72,986	1,335	1,089,118

ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED AND ACTIVE CONTRACTS
STATE WATER PROJECT
(in thousands of dollars)

Part A—Contracts Issued Under the Department of Water Resources Specifications

<i>Specification Number and Feature</i>	<i>Engineers' Estimate</i>	<i>Low Bid</i>	<i>Anticipated Final Cost</i>	<i>Final Con- tract Amount</i>
UPPER FEATHER DIVISION				
Frenchman Dam				
59-19 Frenchman Dam and Reservoir.....	1,481	1,809		1,726
62-04 Frenchman Dam—Forest Service Roads.....	186	240		258
63-14 Recreation Access Road to Frenchman Reservoir.....	367	326		385
65-20 Relocation, Access Road to Frenchman Lake.....	597	429		470
SUBTOTAL—Frenchman Dam.....	2,631	2,804		2,839
Antelope Valley Dam				
62-20 Antelope Valley Dam and Reservoir.....	2,176	2,910	3,221	
Grizzly Valley Dam				
64-22 Grizzly Valley Dam and Lake Davis.....	1,748	1,833	2,275	
Miscellaneous				
66-10 Plaque Mounting Monuments.....	15	12		12
TOTAL—UPPER FEATHER DIVISION.....	6,570	7,559	5,496	2,851
OROVILLE DIVISION				
Oroville Dam and Thermalito Diversion Dam				
62-05 Oroville Dam, including Thermalito Diversion Dam and Diversion Tunnel No. 2.....	130,819	120,863	135,700	
61-05 Diversion Tunnel No. 1.....	6,823	6,194		7,785
61-15 Palermo Outlet Works.....	666	724		801
62-11 Oroville Seismograph Station.....	28	31		39
65-05 Clearing Oroville Reservoir.....	5,738	3,516		3,595
66-05 Bulkhead Gates—Diversion Tunnel No. 1.....	64	67		70
66-42 Oroville Peripheral Dams.....	519	373		499
67-43 Oroville Dam Completion No. 1.....	94	113	130	
67-53 Oroville Reservoir—Service Area Boat Ramp.....	105	104	115	
64-25 Thermalito Diversion Dam—Slide Gates.....	22	21		21
64-26 Thermalito Diversion Dam—Dispersion Cone Valve.....	21	24		25
64-43 Thermalito Diversion Dam—Radial Gates and Hoists.....	1,182	751		779
65-47 Thermalito Diversion Dam—Electrical Installation.....	144	104	209	
67-40 Thermalito Diversion Dam—Stop Logs and Lifting Beams.....	53	44	44	
SUBTOTAL—Oroville Dam and Thermalito Diversion Dam.....	146,278	132,929	136,198	13,614
Oroville Dam Spillway				
65-09 Spillway—Oroville Dam.....	13,965	12,250	14,000	
Oroville Powerplant				
63-06 Oroville Powerplant—Initial.....	20,592	18,367	26,718	
66-32 Oroville Powerplant—Completion.....	9,095	10,585	11,650	
63-05 Turbines and Pump-Turbines.....	8,819	7,239	7,360	
64-13 114-inch Spherical Valves.....	3,110	2,260	2,589	
64-16 Generators and Motor-Generators.....	10,702	6,428	7,008	
64-19 Bridge Cranes.....	353	300	316	
65-10 Generator Switchgear.....	394	348	417	
65-11 Trashracks, Supports, and Shutters.....	2,576	1,962	2,085	
65-14 Governors.....	472	415	437	
65-25 Control Switchboards.....	319	307	394	
65-31 Power Transformers.....	1,623	1,435	1,514	
65-38 High Voltage Circuit Breakers.....	1,069	925	1,020	
65-52 Penstock Intake Completion, Left Abutment.....	3,303	4,430	4,623	
66-29 230-KV Cable Potheads.....	253	202	221	
66-35 Station Service Switchgear.....	692	491	557	
66-36 Station Batteries.....	93	69	78	
SUBTOTAL—Oroville Powerplant.....	63,465	55,763	65,987	
Thermalito Power Canal				
64-31 Thermalito Power Canal Relocations.....	706	935		964
65-37 Thermalito Power Canal.....	5,739	5,549		7,061
SUBTOTAL—Thermalito Power Canal.....	6,445	6,484		8,025

**ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED
AND ACTIVE CONTRACTS—Continued**

STATE WATER PROJECT
(in thousands of dollars)

Part A—Contracts Issued Under the Department of Water Resources Specifications

<i>Specification Number and Feature</i>	<i>Engineers' Estimate</i>	<i>Low Bid</i>	<i>Anticipated Final Cost</i>	<i>Final Con- tract Amount</i>
OROVILLE DIVISION—Continued				
Thermalito Powerplant				
64-37 Thermalito Powerplant.....	15,541	15,248	16,800	
63-39 Turbines, Pump-Turbines, and Governors.....	4,835	3,767	3,889	
65-02 Generator and Motor-Generators.....	2,975	2,150	2,322	
65-34 Power Transformers.....	513	537	563	
65-57 Unit Substation and Station Service.....	92	77	80	
65-58 13.8-KV Generator Switchgear and Bus.....	293	208	218	
66-08 Motor Control Center.....	55	25	26	
66-09 Main Control and Recording Swbds.....	205	155	191	
SUBTOTAL—Thermalito Powerplant.....	24,509	22,167	24,089	
Thermalito Forebay and Afterbay				
65-27 Thermalito Forebay and Afterbay.....	16,829	14,453	16,000	
65-46 Thermalito Forebay and Afterbay—Gates, Hoists, and Standby Generators.....	287	228	267	
SUBTOTAL—Thermalito Forebay and Afterbay.....	17,116	14,681	16,267	
Miscellaneous—Power Oriented				
66-23 230-KV Line Towers, Oroville-Thermalito Bus Line.....	308	255	473	
66-25 Disconnect Switches, Oroville Powerplant and Oroville- Thermalito Bus Line.....	215	225	239	
66-44 Oroville-Thermalito Control System.....	1,344	1,248	1,490	
67-01 Oroville-Thermalito Bus Line.....	1,120	1,293	1,750	
67-04 Table Mountain and Thermalito Breaker Structure.....	69	77	86	
SUBTOTAL—miscellaneous—Power Oriented.....	3,056	3,098	4,038	
Fish Facilities				
62-01 Feather River Fish Barrier Dam.....	1,227	1,097		2,147
66-18 Feather River Hatchery.....	2,959	3,209	3,400	
SUBTOTAL—Fish Facilities.....	4,186	4,306	3,400	2,147
Relocate Western Pacific Railroad and U.S. Highway 40A				
57-03 Western Pacific Railroad—Tunnels 4 and 5.....	11,885	8,499		10,442
57-13 Western Pacific Railroad—North Fork Bridge.....	1,900	1,539		1,581
58-01 Western Pacific Railroad—Feather River Bridge.....	1,536	1,169		1,293
59-16 Western Pacific Railroad—Tunnels 2 and 3.....	6,557	5,720		6,256
60-07 Western Pacific Railroad—Tunnel 1.....	2,172	2,069		1,052
60-08 Western Pacific Railroad—Grading, Oroville to West Branch Bridge.....	4,814	3,613		4,074
60-21 Western Pacific Railroad—Western Union Telegraph Line.....	263	189		262
61-17 Western Pacific Railroad—Section Headquarters.....	167	165		168
61-21 Western Pacific Railroad—Waterproof North Fork and Feather River Bridges.....	20	17		17
63-11 Western Pacific Railroad—Modification and Repair, Powers Canal.....	21	22		24
63-36 Western Pacific Railroad—Powers Canal Repairs and Added Construction.....	39	59		66
SUBTOTAL—Relocate Western Pacific Railroad and U.S. Highway 40A.....	29,374	23,061		26,135
Butte County Roads and Bridges				
62-30 Butte County Roads and Bridges—Middle Fork Feather River Bridge.....	4,751	4,436		4,860
62-35 Oroville-Quincy—Forbestown to Middle Fork Bridge.....	1,151	1,053		1,522
64-51 Oroville-Quincy—Temporary Access, Bidwell Bar Bridge County Road.....	429	328		380
65-23 Oroville to Feather Falls County Road.....	2,390	2,347		2,565
65-26 B. Abbott Goldberg Bridge.....	3,080	2,733	2,830	
64-44 Bidwell Bar Emergency Crossing.....	56	34		31
66-27 Bennum and Lunt Roads.....	353	341		371
67-44 Glen Drive.....	110	93	120	
SUBTOTAL—Butte County Roads and Bridges.....	12,320	11,365	2,950	9,729

**ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED
AND ACTIVE CONTRACTS—Continued**
STATE WATER PROJECT
(in thousands of dollars)

Part A—Contracts Issued Under the Department of Water Resources Specifications

<i>Specification Number and Feature</i>	<i>Engineers' Estimate</i>	<i>Low Bid</i>	<i>Anticipated Final Cost</i>	<i>Final Con- tract Amount</i>
OROVILLE DIVISION—Continued				
Forest Service Roads				
65-44 Log Scaling Station.....	14	8		8
67-29 Forest Service Road Relocation.....	199	188	207	
SUBTOTAL—Forest Service Roads.....	213	196	207	8
Operations and Maintenance Facilities				
66-41 Thermalito Annex.....	184	194	210	
66-52 Oroville O & M Center.....	1,591	1,651	1,775	
SUBTOTAL—Operations and Maintenance Facilities.....	1,775	1,845	1,985	
Miscellaneous				
62-13 Left Abutment Access Road.....	583	452		549
62-27 Construction Headquarters.....	925	938		990
63-04 Employee Housing.....	635	659		619
63-38 Construction Overlook Modifications.....	113	138		138
64-17 Pioneer Cemetery and Grave Relocation.....	63	79		70
64-30 Headquarters and Employee Housing, Landscaping.....	51	37		41
65-59 Construction Overlook Relocation.....	141	124		124
SUBTOTAL—Miscellaneous.....	2,511	2,427		2,531
TOTAL—OROVILLE DIVISION.....	325,213	278,322	270,121	62,189

NORTH BAY AQUEDUCT

Solano Project Terminal Reservoir to Cordelia Surge Tank				
67-09 Pumps and Motors for Solano Project Terminal Reservoir to Cordelia Surge Tank.....	80	88	100	
67-25 Solano Project Terminal Reservoir to Cordelia Surge Tank.....	243	224	247	
SUBTOTAL—Solano Project Terminal Reservoir to Cor- delia Surge Tank.....	323	312	347	
Cordelia Pumping Plant to Napa Turnout Reservoir				
67-05 Cordelia Surge Tank to Napa Turnout Reservoir.....	1,109	999	1,100	
67-21 Napa Turnout Reservoir.....	349	271	290	
SUBTOTAL—Cordelia Pumping Plant to Napa Turnout Reservoir.....	1,458	1,270	1,390	
TOTAL—NORTH BAY AQUEDUCT.....	1,781	1,582	1,737	

SOUTH BAY AQUEDUCT

Interim Intake Facilities				
59-22 Intake Canal and Pumping Plant, and Bethany Dam and Reservoir.....	1,130	878		876
62-08 Asphalt Lining—Intake Canal.....	36	35		39
62-15 Mortar Lining—Intake Canal.....	12	9		10
SUBTOTAL—Interim Intake Facilities.....	1,178	922		925
South Bay Pumping Plant				
60-01 South Bay Pumping Plant and Discharge Lines.....	815	815		869
60-14 Procure South Bay and Forebay Pumping Plants' Pumps and Motors.....		96		101
63-12 Procure Forebay Pumps and Motors Nos. 3, 4, and 5.....	50	22		22
63-13 Procure South Bay Pumps and Motors Nos. 3 and 4.....	80	108		114
63-15 Install Forebay and South Bay Additional Units.....	87	80		88
63-34 Floor Surfacing—South Bay Pumping Plant.....	4	5		6
63-33 Procure South Bay Pumps and Motors Nos. 8 and 9.....	160	129		142
63-34 South Bay Pumping Plant—Second Stage.....	583	593		633
63-40 Procure 30-inch Discharge Valves.....	74	53		54
½ of 63-41 South Bay Pumping Plant to Dyer Canal—Second Stage (Portion applicable to Pumping Plants).....	37	27		27
65-54 Electrical Modifications to South Bay Pumping Plant.....	29	28		31
67-13 Furnish Motors for Units 5, 6, and 7.....	370	255	290	
67-35 Completion Contract—Units 5, 6, and 7.....	490	668	625	
SUBTOTAL—South Bay Pumping Plant.....	2,779	2,779	915	2,086

**ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED
AND ACTIVE CONTRACTS—Continued**

STATE WATER PROJECT
(in thousands of dollars)

Part A—Contracts Issued Under the Department of Water Resources Specifications

<i>Specification Number and Feature</i>	<i>Engineers' Estimate</i>	<i>Low Bid</i>	<i>Anticipated Final Cost</i>	<i>Final Con- tract Amount</i>
SOUTH BAY AQUEDUCT—Continued				
Aqueduct—South Bay Pumping Plant to Del Valle Dam				
60-15 Surge Tank to, and including, Patterson Reservoir.....	2,737	2,983		3,584
62-12 Alameda Division Canal.....	1,217	1,318		1,420
¼ of 63-16 Del Valle-Sunol Pipeline (Alameda Division Canal to Del Valle Wye).....	1,186	921		1,050
63-31 Patterson Reservoir Repair.....	25	29		25
½ of 63-41 South Bay Pumping Plant to Dyer Canal—Second Stage (Portion applicable to Aqueduct).....	37	26		27
64-03 Dyer Canal Check Structure.....	30	30		30
64-49 Modifications to Patterson Reservoir.....	72	61		76
65-49 Highway 50 Tunnel Extension.....	91	89		92
67-67 Del Valle Branch Pipeline.....	782	803	900	
SUBTOTAL—South Bay Pumping Plant to Del Valle Dam.....	6,177	6,260	900	6,304
Del Valle Dam and Reservoir				
65-17 Relocate Del Valle Dam County Road.....	1,399	1,256		1,261
66-01 Del Valle Dam and Reservoir.....	16,760	16,578	18,000	
67-55 Sealing Hetch-Hetchy Valle Shaft.....	140	79	86	
SUBTOTAL—Del Valle Dam and Reservoir.....	18,299	17,913	18,086	1,261
Del Valle Pumping Plant				
67-38 Del Valle Pumping Plant.....	788	765	857	
67-15 Pumps.....	68	79	90	
67-46 Motors and Controls.....	211	163	172	
SUBTOTAL—Del Valle Pumping Plant.....	1,067	1,007	1,119	
Aqueduct—Del Valle Wye to Terminus				
63-03 La Costa Tunnel and Mission Tunnel.....	2,678	2,679		3,082
¾ of 63-16 Del Valle-Sunol Pipeline (South Livermore Turnout to Alameda-Bayside Turnout).....	3,557	2,764		3,150
64-04 Santa Clara Pipeline.....	3,947	4,071		4,794
64-24 Terminal Facilities.....	1,028	1,111		1,136
64-53 Grouting—Mission Tunnel.....	77	36		35
65-18 Sunol Pipeline Blow-off Valve.....	6	7		7
65-19 Sunol Pipeline Blow-off Valve Structure.....	53	29		32
65-22 20-inch Hollow Cone Valve—Sunol Pipeline.....	15	14		15
SUBTOTAL—Del Valle Wye to Terminus.....	11,361	10,711		12,251
Miscellaneous				
62-35 Project Maintenance Headquarters.....	45	36		38
63-02 Instrumentation and Control to Patterson Reservoir.....	50	51		57
SUBTOTAL—Miscellaneous.....	95	87		95
TOTAL—SOUTH BAY AQUEDUCT.....	40,956	39,679	21,020	22,922
CALIFORNIA AQUEDUCT—NORTH SAN JOAQUIN DIVISION				
Intake Facilities				
63-22 Intake Channel and Delta Pumping Plant Excavation ...	8,477	5,699		5,956
65-07 Intake Channel, Station 0+00 to 85+00.....	2,410	2,449		3,252
66-06 Fish Protective Facility, Delta Intake.....	4,041	4,164	4,760	
66-20 Louver Assemblies, Fish Protective Facility.....	129	172	181	
66-40 Pumping Units for Fish Protective Facility.....	199	108	115	
66-45 Gantry Crane for Fish Protective Facility.....	148	188	205	
67-45 Clifton Court Forebay.....	4,543	4,422	5,000	
67-62 Intake Channel Modifications.....	229	237	271	
SUBTOTAL—Intake Facilities.....	20,176	17,439	10,532	9,208
Delta Pumping Plant				
64-09 Delta Pumping Plant—Initial and Discharge Lines.....	6,367	6,332		6,790
66-02 Delta Pumping Plant—Completion.....	3,662	2,866	3,850	
63-21 Delta Seismograph Station.....	3	3		3
64-10 Furnish and Install Pumps.....	2,560	1,621	1,900	
64-20 Bridge Cranes.....	115	90		90

**ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED
AND ACTIVE CONTRACTS—Continued**

STATE WATER PROJECT
(in thousands of dollars)

Part A—Contracts Issued Under the Department of Water Resources Specifications

<i>Specification Number and Feature</i>	<i>Engineers' Estimate</i>	<i>Low Bid</i>	<i>Anticipated Final Cost</i>	<i>Final Con- tract Amount</i>
CALIFORNIA AQUEDUCT—NORTH SAN JOAQUIN DIVISION—Continued				
Delta Pumping Plant—Continued				
64-48 Discharge Valves.....	1,122	1,070	1,144	
65-12 Furnish and Install Motors.....	3,422	3,045	3,220	
65-32 Power Transformers.....	465	493	518	
65-35 Power Circuit Breakers.....	81	75	150	
65-40 Switchgear and Station Service.....	569	509	536	
65-41 Control System.....	397	398	500	
SUBTOTAL—Delta Pumping Plant.....	18,763	16,502	11,818	6,883
Aqueduct—Delta Pumping Plant to Chrisman Road				
63-28 Consolidated Embankment, Station 175 to 655.....	1,950	1,658		1,963
65-06 Aqueduct—Delta Pumping Plant to Chrisman Road.....	11,725	11,146	14,306	
66-17 Bethany Dams.....	1,694	1,717	2,023	
SUBTOTAL—Delta Pumping Plant to Chrisman Road...	15,369	14,521	16,329	1,963
Aqueduct—Chrisman Road to Del Puerto Canyon Road				
65-08 Aqueduct—Chrisman Road to Del Puerto Canyon Road..	11,864	12,390	14,821	
Aqueduct—Del Puerto Canyon Road to Orestimba Creek Road				
½ of 63-01 Consolidated Embankment, Station 2500 to 3000...	543	375		442
64-02 Aqueduct—Del Puerto Canyon Road to Orestimba Creek Road.....	8,156	7,775	11,150	
SUBTOTAL—Del Puerto Canyon Road to Orestimba Creek Road.....	8,699	8,150	11,150	442
Aqueduct—Orestimba Creek Road to O'Neill Forebay				
½ of 63-01 Consolidated Embankment, Station 2500 to 3000...	544	375		443
64-29 Aqueduct—Orestimba Creek Road to San Luis Forebay..	12,009	12,694	22,703	
SUBTOTAL—Orestimba Creek Road to O'Neill Forebay..	12,553	13,069	22,703	443
Operations and Maintenance Facility				
64-08 Delta O & M Facility—Phase I.....	902	1,144		1,164
65-39 Delta O & M Facility—Phase II.....	1,246	1,259		1,291
SUBTOTAL—Operations and Maintenance Facility.....	2,148	2,403		2,455
Miscellaneous				
67-27 Wolfson Road.....	11	7		10
TOTAL—NORTH SAN JOAQUIN DIVISION.....	89,583	84,481	87,353	21,404
CALIFORNIA AQUEDUCT—SOUTH SAN JOAQUIN DIVISION				
Aqueduct—Kettleman City to Avenal Gap				
65-16 Preconsolidation—Vicinity Arroyo Pino.....	24	14		17
66-03 Aqueduct—Kettleman City to Avenal Gap.....	9,041	9,108	10,271	
SUBTOTAL—Kettleman City to Avenal Gap.....	9,065	9,122	10,271	17
Aqueduct—Avenal Gap to 7th Standard Road				
½ of 64-41 Preconsolidation—Lerdo Highway to Tupman Road..	538	443		471
65-28 Aqueduct—Avenal Gap to 7th Standard Road.....	19,876	20,884	23,563	
SUBTOTAL—Avenal Gap to 7th Standard Road.....	20,414	21,327	23,563	471
Aqueduct—7th Standard Road to Tupman Road				
½ of 64-41 Preconsolidation—Lerdo Highway to Tupman Road..	2,152	1,771		1,883
67-06 Aqueduct—7th Standard Road to Tupman Road.....	12,929	10,483	11,535	
SUBTOTAL—7th Standard Road to Tupman Road.....	15,081	12,254	11,535	1,883
Aqueduct—Tupman Road to Buena Vista Pumping Plant				
67-37 Aqueduct—Tupman Road to Buena Vista Pumping Plant..	9,524	10,465	11,512	

**ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED
AND ACTIVE CONTRACTS—Continued**

STATE WATER PROJECT
(in thousands of dollars)

Part A—Contracts Issued Under the Department of Water Resources Specifications

<i>Specification Number and Feature</i>	<i>Engineers' Estimate</i>	<i>Low Bid</i>	<i>Anticipated Final Cost</i>	<i>Final Con- tract Amount</i>
CALIFORNIA AQUEDUCT—SOUTH SAN JOAQUIN DIVISION—Continued				
Buena Vista Pumping Plant¹				
65-36 Intake Channel, Buena Vista Pumping Plant.....	3,564	3,447		3,601
67-47 Buena Vista Pumping Plant (Initial Contract).....	6,498	6,866	7,552	
67-08 Vertical Centrifugal Pumps, Buena Vista Pumping Plant.....	2,514	2,229	2,944	
SUBTOTAL—Buena Vista Pumping Plant.....	12,576	12,542	10,496	3,601
Aqueduct—Buena Vista Pumping Plant to Wheeler Ridge Pump- ing Plant				
64-46 Preconsolidation—Buena Vista Pumping Plant to Wheeler Ridge Pumping Plant No. 1.....	4,172	3,910	4,206	
66-12 Preconsolidation Features—Sunset Railroad to Maricopa Highway.....	766	565	559	
SUBTOTAL—Buena Vista Pumping Plant to Wheeler Ridge Pumping Plant.....	4,938	4,475	4,765	
Wheeler Ridge Pumping Plant¹				
½ of 66-11 Intake Channel—Wheeler Ridge and Wind Gap Pumping Plants.....	2,934	2,288		2,421
67-52 Wheeler Ridge Pumping Plant (Initial Contract).....	10,103	8,813	9,695	
67-19 Pumps.....	2,585	2,297	3,119	
67-64 Motors—Bid opening on 1/10/68.....				
SUBTOTAL—Wheeler Ridge Pumping Plant.....	15,622	13,398	12,814	2,421
Wind Gap Pumping Plant¹				
½ of 66-11 Intake Channel—Wheeler Ridge and Wind Gap Pumping Plants.....	2,934	2,288		2,421
67-50 Wind Gap Pumping Plant (Initial Contract).....	14,795	11,825	13,008	
67-31 Pumps.....	2,524	2,293	2,360	
67-49 Pump Discharge Valves.....	2,556	2,022	2,125	
SUBTOTAL—Wind Gap Pumping Plant.....	22,809	18,428	17,493	2,421
Aqueduct—Wheeler Ridge Pumping Plant to Tehachapi Pump- ing Plant				
63-18 Preconsolidation—Drill and Develop two 16-inch Water Wells.....	91	161		152
63-32 Preconsolidation—Standard Oil Road to Grapevine Creek.....	688	610		635
64-21 Preconsolidation—Wheeler Ridge Pumping Plant to Standard Oil Road.....	950	875		796
64-36 Preconsolidation—Pumps, Motors, and Structures.....	185	172		176
SUBTOTAL—Wheeler Ridge Pumping Plant to Tehachapi Pumping Plant.....	1,914	1,818		1,759
Equipment for Multiple Plant Installation				
67-41 Pump Discharge Valves for Buena Vista and Wheeler Ridge Pumping Plants.....	2,205	2,048	2,150	
67-57 Bridge Cranes for Buena Vista, Wheeler Ridge, Wind Gap, and Oso Pumping Plants.....	551	424	445	
67-70 Power Circuit Breaker for Buena Vista, Wind Gap, Oso, and Wheeler Ridge Pumping Plants.....	427	410	410	
SUBTOTAL—Equipment for Multiple Plant Installation.....	3,183	2,882	3,005	
TOTAL—SOUTH SAN JOAQUIN DIVISION.....	115,126	106,711	105,454	12,573

CALIFORNIA AQUEDUCT—TEHACHAPI DIVISION

Tehachapi Pumping Plant				
63-19 Tehachapi Access Road.....	684	560		571
65-56 Adit to Discharge Line Tunnels.....	283	592		941
66-38 Tehachapi Intake Channel.....	5,783	5,051		5,022
67-02 Tehachapi Pumping Plant Discharge Lines.....	37,146	31,225	34,300	
67-33 Tehachapi Pumping Plant, Initial Contract.....	20,786	19,639	21,600	
67-03 Discharge Valves.....	4,343	4,599	5,962	
67-24 Centrifugal Pumps, First Contract.....	13,857	11,738	12,911	

¹ Certain equipment procurement contracts are listed under "Equipment for Multiple Plant Installation".

**ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED
AND ACTIVE CONTRACTS—Continued**

STATE WATER PROJECT
(in thousands of dollars)

Part A—Contracts Issued Under the Department of Water Resources Specifications

<i>Specification Number and Feature</i>	<i>Engineers' Estimate</i>	<i>Low Bid</i>	<i>Anticipated Final Cost</i>	<i>Final Con- tract Amount</i>
CALIFORNIA AQUEDUCT—TEHACHAPI DIVISION—Continued				
Tehachapi Pumping Plant—Continued				
67-56 Centrifugal Pumps, Second Contract.....	7,144	6,350	6,666	
67-58 Motors and Motor-Generators.....	13,255	7,630	8,011	
SUBTOTAL—Tehachapi Pumping Plant.....	103,281	87,384	89,450	6,534
Tehachapi Crossing				
64-34 Carley V. Porter Tunnel, Phase I.....	999	1,171		1,353
65-04 Carley V. Porter Tunnel, South Portal Excavation.....	890	678		660
65-29 Carley V. Porter Tunnel.....	42,322	33,789	42,250	
66-37 Tunnels 1, 2, 3, and Pastoria Access Road.....	30,821	29,395	32,334	
SUBTOTAL—Tehachapi Crossing.....	75,032	65,033	74,584	2,013
TOTAL—TEHACHAPI DIVISION.....	178,313	152,417	164,034	8,547
CALIFORNIA AQUEDUCT—MOJAVE DIVISION				
Cottonwood Powerplant				
66-46 Cottonwood Powerplant Site Development.....	1,314	1,204		1,224
Aqueduct—Tehachapi Afterbay to Fairmont				
65-01 Meenach Aqueduct Embankment.....	274	224		209
67-10 Cottonwood Powerplant to Fairmont.....	8,960	7,517	8,268	
SUBTOTAL—Tehachapi Afterbay to Fairmont.....	9,234	7,741	8,268	209
Aqueduct—Fairmont to Pearblossom Pumping Plant				
66-43 Anaverde Embankment.....	849	594		705
Pearblossom Pumping Plant				
67-18 Pearblossom Pumping Plant Site Development.....	1,223	1,180	1,280	
Cedar Springs Dam and Silverwood Lake				
67-36 Cedar Springs Dam Exploration Adit.....	271	251	276	
67-50 Cedar Springs Interim Water Supply.....	404	395	435	
SUBTOTAL—Cedar Springs Dam and Silverwood Lake ..	675	646	711	
TOTAL—MOJAVE DIVISION.....	13,295	11,365	10,259	2,138
CALIFORNIA AQUEDUCT—SANTA ANA DIVISION				
San Bernardino Tunnel				
67-39 San Bernardino Tunnel and Intake Tower.....	18,784	21,206	23,376	
TOTAL—SANTA ANA DIVISION.....	18,784	21,206	23,376	
WEST BRANCH, CALIFORNIA AQUEDUCT				
Oso Pumping Plant				
67-07 Oso Pumping Plant—Site Development.....	497	448	493	
67-60 Oso Pumping Plant—Initial Contract.....	8,044	7,125	7,838	
67-22 Pumps for Oso Pumping Plant.....	1,985	2,051	2,740	
67-61 Motors for Oso Pumping Plant.....	2,151	2,347	2,464	
SUBTOTAL—Oso Pumping Plant.....	12,677	11,971	13,535	
Aqueduct—Oso Pumping Plant to Pyramid Powerplant				
66-51 Quail Embankment.....	760	474	748	
Pyramid Dam and Reservoir				
67-30 Pyramid Adits.....	242	239	263	
Aqueduct—Angeles Tunnel				
66-22 Angeles Tunnel.....	97,624	95,040	104,544	
Castaic Dam and Reservoir				
65-42 Castaic Dam Foundation Trench.....	323	399		412
66-16 Castaic Dam Diversion Tunnel.....	9,152	8,581	11,500	
67-20 Castaic Dam Embankment and Spillway.....	65,552	43,390	47,728	
SUBTOTAL—Castaic Dam and Reservoir.....	75,027	52,370	59,228	412

**ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED
AND ACTIVE CONTRACTS—Continued**

STATE WATER PROJECT
(in thousands of dollars)

Part A—Contracts Issued Under the Department of Water Resources Specifications

<i>Specification Number and Feature</i>	<i>Engineers' Estimate</i>	<i>Low Bid</i>	<i>Anticipated Final Cost</i>	<i>Final Con- tract Amount</i>
WEST BRANCH, CALIFORNIA AQUEDUCT—Continued				
Miscellaneous				
67-28 Castaic Project Facilities.....	1,103	1,080	1,188	
TOTAL—WEST BRANCH.....	187,343	161,174	179,506	412
COASTAL BRANCH, CALIFORNIA AQUEDUCT				
California Aqueduct to Devil's Den Pumping Plant				
66-04 Aqueduct—Mile 0 to Mile 14.8.....	4,172	3,675	4,100	
65-55 Preconsolidation—Devil's Den Vicinity.....	93	81		80
SUBTOTAL—California Aqueduct to Devil's Den Pump- ing Plant.....	4,265	3,756	4,100	80
Las Perillas and Badger Hill Pumping Plants				
66-33 Las Perillas and Badger Hill Pumping Plants—Initial....	3,479	3,466	3,800	
65-53 Las Perillas and Badger Hill Pumping Plants, Pumps.....	110	94	110	
66-39 Las Perillas and Badger Hill Pumping Plants, Motors.....	138	118	129	
SUBTOTAL—Las Perillas and Badger Hill Pumping Plants	3,727	3,678	4,039	
TOTAL—COASTAL BRANCH.....	7,992	7,434	8,139	80
STATE WATER PROJECT—GENERAL				
Control System Model				
65-33 Stage I—South Bay Aqueduct.....	1,037	772	1,100	
66-26 Stage II—Sacramento Control Center.....	423	350	487	
SUBTOTAL—Control System Model.....	1,460	1,122	1,587	
Monitor and Control System				
67-32 Alarm System and Level Controls, Delta to 7th Standard Road.....	309	225	270	
Rockfill Testing Facility				
66-07 Rockfill Testing Facility, Laboratory.....	396	310		319
66-15 Rockfill Testing Facility, Machine.....	302	370	384	
SUBTOTAL—Rockfill Testing Facility.....	698	680	384	319
TOTAL—STATE WATER PROJECT—GENERAL.....	2,467	2,027	2,241	319

**ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED
AND ACTIVE CONTRACTS—Continued
STATE WATER PROJECT
(in thousands of dollars)**

**Part B—Contracts Issued (Without a Department of Water Resources
Specification Number) Under the State Office of Procurement**

<i>Purchase estimate number</i>	<i>Description</i>	<i>Final cost</i>
OROVILLE DIVISION		
Oroville-Thermalito Dams		
310505	Carlson's Stress Meters.....	14
340008	Carlson's Stress Meters.....	15
340003	Stress Cells for Monitoring System.....	153
	SUBTOTAL—Oroville-Thermalito Dams.....	182
Oroville-Thermalito Powerplants and Bus Line		
340019	Suspension Type Insulators.....	17
340023	186 Insulators—900-KV.....	63
340042	31,000 Gallons Turbine Oil.....	16
340030	Suspension Type Insulators.....	26
340040	Cable.....	417
340013	Suspension Type Insulators.....	48
340062	Carrier Current Equipment and Instrument Transformers.....	251
	SUBTOTAL—Oroville-Thermalito Powerplants and Bus Line.....	838
	TOTAL—OROVILLE DIVISION.....	1,020
NORTH BAY AQUEDUCT		
340064	Four Distribution Type Transformers, Cordelia Pumping Plant.....	25
340072	Motor Control Equipment, Cordelia Pumping Plant.....	50
	TOTAL—NORTH BAY AQUEDUCT.....	75
SOUTH BAY AQUEDUCT		
310008	Two 24-inch Spherical Valves.....	31
112439	Parts and Repairs to Pump No. 2.....	17
D-10091	Modifications and Repairs, Units Nos. 4 and 3.....	28
340084	Primary Substation Transformer (Del Valle Pumping Plant).....	11
	TOTAL—SOUTH BAY AQUEDUCT.....	87
NORTH SAN JOAQUIN DIVISION		
340024	Closed Conduit and Automatic Canal Traversing System Flow Meters.....	230
	TOTAL—NORTH SAN JOAQUIN DIVISION.....	230
SOUTH SAN JOAQUIN DIVISION		
340046	Insulated and Bare Grounding Cables—Bakersfield.....	200
340079	455 Insulators—Bakersfield.....	37
340077	Four Transformers—Buena Vista and Wheeler Ridge Pumping Plants.....	817
	TOTAL—SOUTH SAN JOAQUIN DIVISION.....	1,054
COASTAL BRANCH		
340044	Four Transformers Each for Badger Hill and Las Perillas Pumping Plants.....	160
	TOTAL—COASTAL BRANCH.....	160

**ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED
AND ACTIVE CONTRACTS—Continued**

STATE WATER PROJECT

(in thousands of dollars)

Part C—Contracts for Relocations

<i>Agency</i>	<i>Number of contracts</i>	<i>Contract cost</i>
OROVILLE DIVISION		
Pacific Telephone and Telegraph Company.....	28	269
Western Pacific Railroad.....	1	7,419
Division of Highways.....	8	20,834
Oroville-Wyandotte Irrigation District.....	29	837
Pacific Gas and Electric Company.....	43	1,777
Sacramento-Northern Railroad.....	2	565
Thermalito Irrigation District.....	8	151
Miscellaneous.....	36	224
TOTAL—OROVILLE DIVISION.....		32,076
NORTH BAY AQUEDUCT		
Miscellaneous.....	11	14
SOUTH BAY AQUEDUCT		
City and County of San Francisco.....	3	795
Union Oil.....	1	69
Western Union.....	1	92
Miscellaneous.....	38	141
TOTAL—SOUTH BAY AQUEDUCT.....		1,097
NORTH SAN JOAQUIN DIVISION		
Byron-Bethany Irrigation District.....	1	120
City and County of San Francisco.....	2	88
Pacific Gas and Electric Company.....	27	263
Shell Oil.....	14	535
Standard Oil.....	9	706
Stanpac.....	7	640
Union Oil.....	7	833
Western Pacific Railroad.....	1	81
Southern Pacific Railroad.....	2	97
Division of Highways.....	10	1,373
Miscellaneous.....	20	119
TOTAL—NORTH SAN JOAQUIN DIVISION.....		4,855
SOUTH SAN JOAQUIN DIVISION		
Atlantic-Richfield.....	19	865
Cuyama Pipeline.....	5	135
Mobil Oil.....	9	204
Pacific Gas and Electric Company.....	17	371
Pacific Lighting Service and Supply.....	5	367
Pacific Telephone and Telegraph Company.....	14	112
Southern California Gas.....	13	520
Standard Oil.....	11	469
Texaco.....	3	165
West Kern County Water District.....	3	139
Division of Highways.....	17	2,677
Miscellaneous.....	28	416
TOTAL—SOUTH SAN JOAQUIN DIVISION.....		6,440
TEHACHAPI DIVISION		
Miscellaneous.....	4	9
MOJAVE DIVISION		
California Interstate Telephone.....	5	105
Hesperia Water Company.....	1	160
Los Angeles Water and Power.....	7	164
Southern California Edison.....	23	1,260
Southern Pacific Railroad.....	2	250
Los Angeles County Road.....	5	3,984
San Bernardino County Road.....	3	170

**ANTICIPATED OR FINAL CONTRACT COST OF COMPLETED
AND ACTIVE CONTRACTS—Continued
STATE WATER PROJECT**
(in thousands of dollars)

Part C—Contracts for Relocations—Continued

<i>Agency</i>	<i>Number of contracts</i>	<i>Contract cost</i>	
MOJAVE DIVISION—Continued			
Division of Highways.....	11	5,939	
Miscellaneous.....	27	320	
		<hr/>	
TOTAL—MOJAVE DIVISION.....			12,352
SANTA ANA DIVISION			
Southern California Edison.....	6	306	
Riverside County.....	4	744	
Miscellaneous.....	18	160	
		<hr/>	
TOTAL—SANTA ANA DIVISION.....			1,210
WEST BRANCH			
Atlantic-Richfield.....	4	965	
Cuyama Pipeline.....	6	1,466	
Mobil Oil.....	5	436	
Pacific Lighting Service and Supply.....	5	1,613	
Pacific Telephone and Telegraph Company.....	5	181	
Pacific West Industries.....	1	490	
Southern California Edison.....	11	764	
Southern California Gas.....	6	1,469	
Los Angeles County Road.....	11	7,170	
Los Angeles Fire Department.....	1	200	
Division of Highways.....	1	12	
		<hr/>	
TOTAL—WEST BRANCH.....			14,766
COASTAL BRANCH			
Miscellaneous.....	13		167

Part D—Contracts With Office of Architecture and Construction

<i>Feature</i>	<i>Engineers' estimate</i>	<i>Low Bid</i>	<i>Final contract amount</i>
UPPER FEATHER DIVISION			
Beckwourth (changed from Portola) Operation and Maintenance Subcenter..	192	185	255
SOUTH SAN JOAQUIN DIVISION			
Lost Hills Operation and Maintenance Center.....	956	818	1,080

VI. ESTIMATED FUTURE CONSTRUCTION CONTRACT
COSTS—STATE WATER PROJECT

ESTIMATED FUTURE CONSTRUCTION CONTRACT COSTS STATE WATER PROJECT

This table presents estimated construction direct pay cost for construction contracts to be advertised after January 1, 1968. These costs are a product of the same basic cost estimate developed for the capital costs presented in Bulletin 132-67.

(Prepared in answer to 11/8/67 request by Senator Gordon Cologne.)

February 1968

ESTIMATED FUTURE CONSTRUCTION CONTRACTS STATE WATER PROJECT

SUMMARY

(in thousands of dollars)

Division	Estimated contract cost	Division	Estimated contract cost
Upper Feather.....	9,918	Mojave.....	119,360
Oroville.....	1,200	Santa Ana.....	112,339
North Bay Aqueduct.....	6,456	West Branch.....	95,245
South Bay Aqueduct.....	529	Coastal Branch.....	40,203
North San Joaquin.....	9,438	General.....	20,339
South San Joaquin.....	61,416		
Tehachapi.....	30,813	TOTAL.....	507,256

ESTIMATED FUTURE CONSTRUCTION CONTRACT COSTS**STATE WATER PROJECT**
(in thousands of dollars)

<i>Feature</i>	<i>Estimated contract cost</i>
UPPER FEATHER DIVISION	
Abbey Bridge Dam	
Abbey Bridge Dam and Reservoir.....	4,977
Dixie Refuge Dam	
Dixie Refuge Dam and Reservoir.....	2,780
Dixie Refuge Access Road.....	2,161
SUBTOTAL—Dixie Refuge Dam.....	4,941
SUBTOTAL—UPPER FEATHER DIVISION.....	9,918
OROVILLE DIVISION	
Operation and Maintenance Facilities	
Oroville Operation and Maintenance Center, Glen Drive, Landscaping.....	56
Oroville Operation and Maintenance Center, Thermalito Annex Water Supply.....	23
SUBTOTAL—Oroville Operation and Maintenance Center.....	79
Miscellaneous	
Oroville Division Completion II.....	839
Reconstruction of Bidwell Bridge and Tollhouse.....	282
SUBTOTAL—Miscellaneous.....	1,121
SUBTOTAL—OROVILLE DIVISION.....	1,200
NORTH BAY AQUEDUCT	
North Bay Aqueduct—Stage II	
Aqueduct, Lindsey Slough to Cordelia Pumping Plant.....	4,510
Aqueduct, Cordelia Pumping Plant to Cordelia Surge Tank.....	746
SUBTOTAL—North Bay Aqueduct—Stage II.....	5,256
Calhoun Pumping Plant	
Calhoun Pumping Plant and Manifolds.....	495
Cordelia Pumping Plant	
Cordelia Pumping Plant and Manifolds.....	630
Miscellaneous	
North Bay Aqueduct Modifications, Stage I.....	40
North Bay Aqueduct Modifications, Stage II.....	35
SUBTOTAL—Miscellaneous.....	75
SUBTOTAL—NORTH BAY AQUEDUCT.....	6,456
SOUTH BAY AQUEDUCT	
Miscellaneous	
Modifications to South Bay Aqueduct.....	250
South Bay Aqueduct Slope Modification.....	279
SUBTOTAL—Miscellaneous.....	529
SUBTOTAL—SOUTH BAY AQUEDUCT.....	529
NORTH SAN JOAQUIN DIVISION	
Intake Facilities	
Fish Protective Facility, Testing Equipment.....	133
Fish Protective Facility, Fish Release Sites.....	46
SUBTOTAL—Intake Facilities.....	179
Delta Pumping Plant, Units Nos. 8 and 9	
Pumps (2).....	873
Valves (2).....	508
Motors (2).....	1,170
Motor Switchgear (2).....	177
Transformer (1).....	195
Completion Contract.....	572
Control System.....	22
SUBTOTAL—Delta Pumping Plant, Units Nos. 8 and 9.....	3,517

ESTIMATED FUTURE CONSTRUCTION CONTRACT COSTS—Continued**STATE WATER PROJECT**
(in thousands of dollars)

<i>Feature</i>	<i>Estimated contract cost</i>
NORTH SAN JOAQUIN DIVISION—Continued	
Delta Pumping Plant, Units Nos. 10 and 11	
Pumps (2).....	1,142
Valves (2).....	635
Motors (2).....	1,462
Motor Switchgear (2).....	221
Transformers (2).....	485
Completion Contract.....	715
Control System.....	28
SUBTOTAL—Delta Pumping Plant, Units Nos. 10 and 11.....	4,688
Operation and Maintenance Facilities	
Completion of Delta Operation and Maintenance Center.....	82
Miscellaneous	
Pumps for Ground Water Relief.....	162
Aqueduct Unwatering Pumps.....	89
Canal Modification.....	721
SUBTOTAL—Miscellaneous.....	972
SUBTOTAL—NORTH SAN JOAQUIN DIVISION.....	9,438
SOUTH SAN JOAQUIN DIVISION	
Buena Vista Pumping Plant	
Motors.....	2,439
Completion Contract.....	2,543
Motor Switchgear, Bus, etc.....	864
Station Service.....	126
Insulated Cable.....	178
Disconnect Switches.....	77
Control System.....	436
SUBTOTAL—Buena Vista Pumping Plant.....	6,663
Aqueduct—Buena Vista Pumping Plant to Wheeler Ridge Pumping Plant	
Aqueduct—Buena Vista Pumping Plant to Wheeler Ridge Pumping Plant.....	19,871
Wheeler Ridge Pumping Plant	
Motors.....	2,670
Completion Contract.....	2,698
Station Service.....	135
Motor Switchgear, Bus, etc.....	848
Insulated Cable.....	193
Control System.....	461
Disconnect Switches.....	82
SUBTOTAL—Wheeler Ridge Pumping Plant.....	7,087
Wind Gap Pumping Plant	
Completion Contract.....	2,747
Motors.....	5,335
Transformers.....	975
Insulated Cable.....	178
Station Service.....	127
Motor Switchgear, Bus, etc.....	782
Disconnect Switches.....	82
Control Room Equipment.....	456
SUBTOTAL—Wind Gap Pumping Plant.....	10,682
Aqueduct—Wheeler Ridge Pumping Plant to Tehachapi Pumping Plant	
Aqueduct—Wheeler Ridge Pumping Plant to Tehachapi Pumping Plant.....	14,566
Operation and Maintenance Facilities	
South San Joaquin Operation and Maintenance Center—Earthwork.....	155
South San Joaquin Operation and Maintenance Center—Completion.....	2,183
Lost Hills Operation and Maintenance Subcenter—Landscaping.....	44
SUBTOTAL—Operation and Maintenance Facilities.....	2,382
Miscellaneous	
Slope Protection—Buena Vista, Wheeler Ridge, Wind Gap, and Tehachapi Pumping Plants.....	165
SUBTOTAL—SOUTH SAN JOAQUIN DIVISION.....	61,416

ESTIMATED FUTURE CONSTRUCTION CONTRACT COSTS—Continued**STATE WATER PROJECT**

(in thousands of dollars)

<i>Feature</i>	<i>Estimated contract cost</i>
TEHACHAPI DIVISION	
Tehachapi Pumping Plant	
Pressure Reducing Valves.....	382
Surge Tank.....	774
Discharge Line Valves.....	784
Completion Contract.....	8,152
Bridge Cranes (5).....	572
Valve Gantry Crane.....	150
Gantry Cranes (2).....	188
15-KV Bus.....	530
Pumps—Third Contract (3).....	3,220
Motors—Second Contract (3).....	2,823
Transformers, Power.....	2,733
Transformers, Metering.....	47
Station Service.....	166
Insulated Cable.....	267
Motor Switchgear.....	644
High Voltage Circuit Breakers.....	1,052
Disconnect Switches.....	446
Control Room Equipment.....	509
SUBTOTAL—Tehachapi Pumping Plant.....	23,439
Tehachapi Crossing	
Pastoria Siphon.....	3,195
Beartrap Access Structure.....	1,266
Tehachapi Afterbay, Siphon No. 4, and Control Structure.....	2,913
SUBTOTAL—Tehachapi Crossing.....	7,374
SUBTOTAL—TEHACHAPI DIVISION.....	30,813
MOJAVE DIVISION	
Cottonwood Powerplant	
Cottonwood Powerplant (Structure).....	1,535
Penstock.....	1,164
Energy Dissipator.....	934
Energy Dissipator Valves.....	279
Turbines, Governors, and Valves.....	1,095
Crane.....	135
Generators.....	513
Generator Switchgear and Bus.....	21
Transformers.....	76
High Voltage Circuit Breakers.....	43
Remote Automatic and Protective Equipment.....	34
Station Service Switchgear.....	117
Station Battery and Associated Equipment.....	41
Completion Contract, including Accessory Electrical Equipment.....	466
SUBTOTAL—Cottonwood Powerplant.....	6,453
Aqueduct—Cottonwood Powerplant to Pearblossom Pumping Plant	
Aqueduct—Fairmont to Leona Siphon.....	14,142
Aqueduct—Leona Siphon to Pearblossom Pumping Plant.....	15,870
SUBTOTAL—Aqueduct—Cottonwood Powerplant to Pearblossom Pumping Plant.....	30,012
Pearblossom Pumping Plant	
Plant Building (Initial Structure).....	6,165
Discharge Lines.....	8,296
Vertical Centrifugal Pumps (4), First Contract.....	942
Vertical Centrifugal Pumps, (2), Second Contract.....	564
Discharge Valves (6).....	461
Bridge Crane.....	153
Motors (4), First Contract.....	1,163
Motors (2), Second Contract.....	838
High Voltage Circuit Breakers.....	194
Transformers.....	317
Switchgear and Bus, First Contract.....	365
Switchgear and Bus, Second Contract.....	216
Station Service and Disconnect Switches.....	214
Control Room Equipment, First Contract.....	338
Control Room Equipment, Second Contract.....	27
Completion Contract, First Contract.....	1,653
Completion Contract, Second Contract.....	297
Insulated Cable.....	117
SUBTOTAL—Pearblossom Pumping Plant.....	22,330

ESTIMATED FUTURE CONSTRUCTION CONTRACT COSTS—Continued

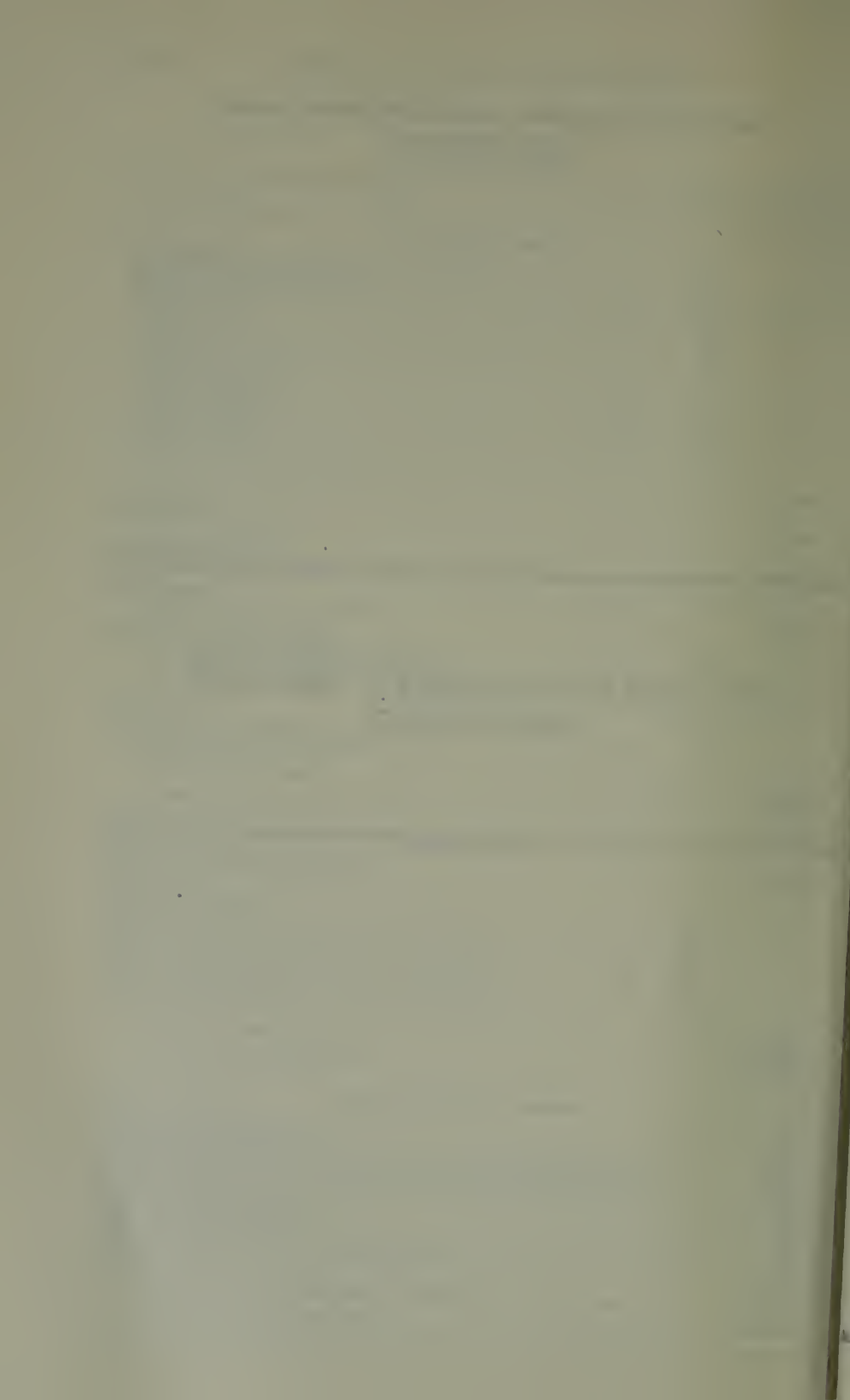
STATE WATER PROJECT
(in thousands of dollars)

Feature	Estimated contract cost
MOJAVE DIVISION—Continued	
Aqueduct—Pearblossom Pumping Plant to Silverwood Lake	
Aqueduct—Pearblossom Pumping Plant to Los Angeles-San Bernardino County Line	8,629
Aqueduct—Los Angeles-San Bernardino County Line to Mojave Siphon	16,186
Mojave Siphon	2,816
SUBTOTAL—Aqueduct—Pearblossom Pumping Plant to Silverwood Lake	27,631
Silverwood Lake	
Cedar Springs Dam and Silverwood Lake	29,352
Operation and Maintenance Facilities	
Fairmont Operation and Maintenance Center	2,410
Hesperia Operation and Maintenance Center	1,172
SUBTOTAL—Operation and Maintenance Facilities	3,582
SUBTOTAL—MOJAVE DIVISION	119,360
SANTA ANA DIVISION	
Devil Canyon Powerplant	
Site Development	3,857
Devil Canyon Powerplant (Structure and Penstocks)	9,142
Valves	577
Turbines	2,374
Crane	314
Generators	1,762
Transformers	337
High Voltage Circuit Breakers	153
Switchgear and Bus	99
Insulators	1
Station Service	179
Control Room Equipment	1,093
Completion Contract	2,880
SUBTOTAL—Devil Canyon Powerplant	22,768
Aqueduct—Devil Canyon Powerplant to Perris Reservoir	
Aqueduct—Devil Canyon Power Development to Mill Street	16,162
Aqueduct—Mill Street to Riverside S.E. City Limit	21,057
Aqueduct—Riverside S.E. City Limit to Perris Reservoir	13,894
SUBTOTAL—Aqueduct—Devil Canyon Powerplant to Perris Reservoir	51,113
Perris Reservoir	
Perris Dam and Reservoir	37,846
Operation and Maintenance Facilities	
Perris Operation and Maintenance Center	612
SUBTOTAL—SANTA ANA DIVISION	112,339
WEST BRANCH	
Oso Pumping Plant	
Discharge Valves	583
High Voltage Circuit Breakers	190
Disconnect Switches	85
Duplex Boards	221
Transformers	327
Switchgear, Bus, and Station Service	685
Insulated Cable	144
Control Room Equipment	481
Completion Contract	1,887
SUBTOTAL—Oso Pumping Plant	4,603
Aqueduct—Oso Pumping Plant to Pyramid Powerplant	
Quail Canal	11,169
Aqueduct—Peace Valley Pipeline	13,919
Gorman Creek Debris Dam	1,965
SUBTOTAL—Aqueduct—Oso Pumping Plant to Pyramid Powerplant	27,053

ESTIMATED FUTURE CONSTRUCTION CONTRACT COSTS—Continued**STATE WATER PROJECT**
(in thousands of dollars)

<i>Feature</i>	<i>Estimated contract cost</i>
WEST BRANCH—Continued	
Pyramid Powerplant	
Site Development, Penstock, Tunnels, and Surge Chamber.....	12,495
Pyramid Powerplant (Initial Structure).....	3,068
Governors.....	160
Turbines and Valves.....	3,207
Crane and Hoist.....	406
Generators.....	1,920
Transformers.....	564
High Voltage Circuit Breakers.....	229
Generator Switchgear.....	169
Station Service Switchgear.....	58
Disconnect Switches.....	46
Control Room Equipment.....	143
Completion Contract.....	1,810
Station Battery and D.C. Equipment.....	22
Insulators.....	7
SUBTOTAL—Pyramid Powerplant.....	24,304
Pyramid Reservoir	
Pyramid Dam and Reservoir.....	22,962
Aqueduct—Angeles Tunnel	
Angeles Tunnel Intake Facilities.....	5,084
Castaic Reservoir	
Castaic Dam and Reservoir—Outlet Works.....	10,512
Operation and Maintenance Facilities	
Castaic Operation and Maintenance Center, Phase I.....	494
Castaic Operation and Maintenance Center, Phase II.....	133
SUBTOTAL—Operation and Maintenance Facilities.....	627
Miscellaneous	
Castaic Dam Overlook Building.....	44
Castaic Project Headquarters, Landscaping.....	56
SUBTOTAL—Miscellaneous.....	100
SUBTOTAL—WEST BRANCH DIVISION.....	95,245
COASTAL BRANCH	
Las Perillas and Badger Hill Pumping Plants	
Additional Units Nos. 4, 5, and 6.....	1,706
Coastal Branch, Stage II	
Devil's Den Pumping Plant.....	2,368
Aqueduct—Devil's Den Pumping Plant to Sawtooth Pumping Plant.....	2,648
Sawtooth Pumping Plant.....	1,959
Aqueduct—Sawtooth Pumping Plant to Polonio Pumping Plant.....	2,555
Polonio Pumping Plant.....	2,461
Aqueduct—Polonio Pumping Plant to San Luis Obispo Powerplant.....	16,504
San Luis Obispo Powerplant.....	1,390
Aqueduct—San Luis Obispo Powerplant to Santa Maria Terminus.....	8,612
SUBTOTAL—Coastal Branch, Stage II.....	38,497
SUBTOTAL—COASTAL BRANCH.....	40,203
STATE WATER PROJECT—GENERAL	
Monitor and Control System	
Sacramento Dispatch and Control Center.....	608
Peripheral Canal Control System.....	1,294
California Aqueduct Control System, Delta to Buena Vista Pumping Plant and Coastal Branch.....	6,432
California Aqueduct Control System, Buena Vista Pumping Plant to Tehachapi Afterbay.....	3,572
California Aqueduct Control System, Mojave, Santa Ana, and West Branch Divisions.....	4,251
Coastal Branch Completion.....	990
South Bay Aqueduct Completion.....	669
North Bay Aqueduct Completion.....	915
Oroville-Thermalito Completion.....	688
Plants Interconnection, Delta, San Luis, and Dos Amigos.....	612
Del Valle Branch.....	308
SUBTOTAL—STATE WATER PROJECT—GENERAL.....	20,339
TOTAL—STATE WATER PROJECT.....	507,256

VII. COSTS AS OF JANUARY 1, 1967—STATE
WATER PROJECT



COSTS AS OF JANUARY 1, 1967 **STATE WATER PROJECT**

This table presents a summary of all costs associated with planning, design, and construction of the units covered in Tables 2 and 3. Adjustments have been made to Tables 2 and 3 to put all costs on the same time basis, as of January 1, 1967. The divisions which do not have this detail are the San Luis Division, contracts for which were administered by the U.S. Bureau of Reclamation; the Delta Facilities; San Joaquin Drain; and Upper Eel River Development, all of which have not had detailed construction contract estimates prepared; Davis-Grunsky, which are projects developed by local agencies; and the two miscellaneous items.

(Prepared in answer to 11/8/67 request by Senator Gordon Cologne.)

February 1968

COSTS AS OF JANUARY 1, 1967 **STATE WATER PROJECT** (in thousands of dollars)

Division	Total	Constr.	R/W	Engrg.	Preop.	Misc.
Upper Feather.....	21,401	17,815	1,363	2,141	82	0
Oroville.....	473,898	357,146	52,248	62,079	1,743	682
North Bay Aqueduct.....	14,187	8,377	2,356	2,861	593	0
South Bay Aqueduct.....	65,277	46,730	7,332	11,155	14	46
North San Joaquin.....	158,155	122,828	15,219	19,351	757	0
South San Joaquin.....	253,922	190,192	12,105	45,838	5,787	0
Tehachapi.....	235,681	193,813	1,084	37,487	3,297	0
Mojave.....	203,492	143,339	27,780	24,027	6,734	1,612
Santa Ana.....	182,969	143,045	9,830	27,013	1,917	1,164
West Branch.....	333,936	258,048	24,953	41,304	3,515	6,116
Coastal Branch.....	72,854	48,556	8,066	14,939	1,293	0
General.....	27,531	20,905	0	6,626	0	0
Subtotal.....	2,043,303	1,550,794	162,336	294,821	25,732	9,620
San Luis.....	192,974					
Delta Facilities.....	55,380					
San Joaquin Drain.....	42,229					
Upper Eel River Development.....	348,356					
Davis-Grunsky.....	131,423					
Unallocated.....	443					
Costs Credited to Income.....	4,370					
TOTAL.....	2,818,478					

O

Progress Report to the Legislature
1968 Regular Session

REPORT NO. 3

SENATE COMMITTEE ON WATER RESOURCES

**Repayment of Recreation and Fish and Wildlife
Enhancement Costs of the State Water Project**

MEMBERS OF THE COMMITTEE

GORDON COLOGNE, *Chairman*

MERVYN M. DYMALLY, *Vice Chairman*

NICHOLAS C. PETRIS *

JOHN L. HARMER

H. I. RICHARDSON

MILTON MARKS *

ALBERT S. RODDA

JAMES R. MILLS

HOWARD WAY

LOUIS B. ALLEN, JR., *Consultant*

KAY COLEMAN, *Secretary*

* Committee membership terminated January 31, 1968.

James Q. Wedworth appointed January 31, 1968.

James E. Whetmore appointed January 31, 1968.



Published by the
SENATE
OF THE STATE OF CALIFORNIA

HON. ROBERT H. FINCH
President of the Senate

HON. HUGH M. BURNS
President pro Tempore

JOSEPH A. BEEK
Secretary of the Senate

CALIFORNIA LEGISLATURE
SENATE COMMITTEE ON WATER RESOURCES
July 18, 1968

HONORABLE ROBERT H. FINCH
President of the Senate

and

GENTLEMEN OF THE SENATE
Senate Chamber, Sacramento

Mr. President and Gentlemen of the Senate :

Your Senate Committee on Water Resources submits herewith its progress report to the Legislature, Report No. 3, 1968 Regular Session, entitled "Repayment of Recreation and Fish and Wildlife Enhancement Costs of the State Water Project."

Respectfully submitted,

GORDON COLOGNE, *Chairman*

MERVYN M. DYMALLY
Vice Chairman

NICHOLAS C. PETRIS

JOHN L. HARMER

H. L. RICHARDSON

MILTON MARKS

ALBERT S. RODDA

JAMES R. MILLS

HOWARD WAY

CONTENTS

Page

Introduction	7
Brief History	8
Conclusions and Recommendations	11
Legislative Analyst's Position	14
Department of Water Resources' Position	16
Appendices:	
I. Statement of the Legislative Analyst	19
II. Statement of the Department of Water Resources	27

INTRODUCTION

At the 1967 Regular Session of the Legislature, Senator Gordon Cologne introduced Senate Bill 1046, the passage of which would provide necessary legislative approval for the Department of Water Resources allocations of costs at State Water Project facilities as reported in Department of Water Resources Bulletin No. 153-67 entitled "Allocations of Costs Among Purposes of the California State Water Project."

This legislation, which provided the first such approval, was, in essence, the culmination of many years of effort on the part of the Legislature and two administrations in defining the proper role of recreation and fish and wildlife enhancement at state-constructed water projects and in the obtaining of financing necessary to properly implement the previously established state policy.

While it was thought that SB 1046 would be a somewhat routine piece of legislation, several very fundamental policy questions regarding the reimbursement of the joint costs allocated to recreation and fish and wildlife enhancement were raised by the office of the Legislative Analyst at the time this bill was considered by the Senate Finance Committee.

In essence, there were three policy questions raised by the analyst which he felt required additional policy determinations by the Legislature.

First, the analyst questioned whether or not it was appropriate to reimburse the water project for costs allocated to recreation and/or fish and wildlife enhancement which resulted from the expenditure of funds made prior to the enactment of the Burns-Porter Act.

Second, the analyst questioned the propriety of reimbursing the project for the allocated joint costs of recreation and/or fish and wildlife enhancement and for specific recreation land costs which were paid from sources *other than Burns-Porter Act bond proceeds*.

Third, the analyst felt that the project should not be reimbursed for expenditures made to acquire lands specifically for recreational purposes until such time as the Department of Water Resources submitted its joint cost allocation on a particular project facility to the Legislature for approval.

Due to the Legislative Analyst's concern over these policy questions, amendments were made to Senate Bill 1046 to specify that "... the granting of legislative approval to the cost allocations and specific recreation land costs specified . . . shall not constitute a precedent for legislative approval of future departmental cost allocations and recreation land costs among the purposes of any state water project."

The bill further specified that the provisions of SB 1046 would be effective only until the 61st day following the final adjournment of the 1968 Regular Session of the Legislature thus requiring that the Legislature again consider these policy questions.

In order to guide the Legislature during subsequent legislative consideration of this matter, the Senate Finance Committee also suggested

that the subject matter of Senate Bill 1046 should be considered by this committee during the interim in order that the committee might make policy recommendations to the Legislature at the 1968 Regular Session to resolve these problems. Pursuant to that suggestion, an interim study then was conducted by the Senate Committee on Water Resources and members of the Senate Finance Committee were invited to join in the hearings.

All matters relating to the reimbursement of funds expended for recreation and fish and wildlife enhancement purposes at state water projects were thoroughly reviewed by this committee at a public hearing in Sacramento on September 6, 1967.

This report and the conclusions and recommendations contained herein are based upon testimony received at that hearing.

BRIEF HISTORY

The legislative history regarding the role of recreation and fish and wildlife and the reimbursability or nonreimbursability of costs incurred in providing for such purposes is basically characterized by an evolutionary approach to the entire problem.

During the period the Legislature was considering the authorization of a state water development program it was generally understood that the planning had included recreational development and fish and wildlife enhancement as an integral part of the entire water development program. Various sections were from time to time added to the Water Code which were intended to direct due consideration for recreation and fish and wildlife and implying that any costs incurred for such development would be a nonreimbursable cost of the project. None of these early enactments, however, contained a comprehensive recital of legislative policy on the entire subject matter.

The State Water Resources Law of 1945, which was codified as Part 6 of Division 5 of the Water Code in 1953, provided that, "In studying water development projects, full consideration shall be given to all beneficial uses of the State's water resources, including . . . preservation and development of fish and wildlife resources, and recreational facilities . . ."

This act also went on to imply the concept of project responsibility for the mitigation of damage to fish and wildlife resources which was ultimately included in the Davis-Dolwig Act by providing that "In determining the cost of any project, damage to fish and wildlife therefrom must be included in the amount of the cost."

In 1958 the Legislature enacted Water Code Section 345 which required the Department of Water Resources to plan for recreation development associated with state-constructed water projects and thereafter to acquire land necessary to implement plans for such development pursuant to specific legislative authorization.

In enacting this section, the Legislature also declared its intent, "... that no water resources development funds will be appropriated for the purpose of acquiring land for recreation development associated with state-constructed water projects, exclusive of land required for storage and conservation of water for such projects."¹

¹ Chapter 101, Statutes of 1958, First Extraordinary Session.

The enactment of this section was followed in 1959 by the addition of two sections to the Water Code expressing additional legislative policy in this area.

Section 233 precluded the department from submitting plans or proposals for the authorization of a project to the Legislature unless provisions were made "... for any water or facilities necessary for public recreation and the preservation and enhancement of fish and wildlife resources that the Department of Water Resources determines to be justifiable in terms of statewide interest, and feasible, *as a non-reimbursable cost of the project.*" (Emphasis added)

During the 1959 interim period, the Senate Fact Finding Committee on Water Resources, chaired by Senator Stephen P. Teale, conducted an extensive study of the recreational and fish and wildlife aspects of California's water development program including particularly the subject of nonreimbursable project costs.

The committee in its report filed in March of 1960 concluded that "... no clear policy has been laid down by the Legislature for assignment of costs of preserving and enhancing fish and wildlife resources or for facilities for public recreation in connection with the State Water Development System. Legislative intent that expenditures for these purposes should be nonreimbursable from system revenues can be inferred from Section 233 of the Water Code enacted at the last session. The section, however, calls for designation of such costs as nonreimbursable only in project reports of the Department of Water Resources."² The committee also noted that previous expressions of legislative policy in this area apparently anticipated a unit-by-unit authorization of the system by the Legislature rather than the blanket authorization of an entire system of works as was included in the Burns-Porter Act.

The committee recognizing the necessity of having a clear declaration of legislative policy went on to recommend legislation to clearly define responsibility for fish and wildlife mitigation and for recreation and fish and wildlife enhancement and to establish a definitive state policy.

The committee stated, "Legislation is recommended to require that the costs of measures and facilities to prevent or mitigate damage to fish and wildlife resulting from construction of the system be made a charge against vendible services of the project.

"Legislation is recommended to require the financing of construction and operation of facilities for the enhancement of fish and wildlife resources and for public recreational activities in connection with the State Water Resources Development System. These facilities and expenses should include but not be limited to maintenance of minimum reservoir levels, the acquisition of land and access roads."³

The recommendations of the Senate Committee were carried out at the 1961 Session of the Legislature with the passage of the Davis-Dolwig Act which declared recreation and fish and wildlife enhancement to be purposes of state-constructed water projects. The act further

² Contracts, Financing, Cost Allocations . . . for State Water Development, a partial report of the Senate Fact Finding Committee on Water Resources, March 1960, p. 10.

³ *Ibid.*, p. 10.

declared that any costs incurred for the development of recreational facilities or for the enhancement of fish and wildlife were nonreimbursable costs of the project which would be funded from the General Fund.

It should be noted, however, that the Davis-Dolwig Act left one major gap in the water project recreational program in that while the act declared the intent of the Legislature to appropriate money from the General Fund for such purposes, there was no assurance that such funds would, in fact, become available for either joint costs, specific recreational land costs, or separable onshore development costs.

This, of course, created severe problems due to the fact that vital *project funds* would be expended to carry out the purposes of the Davis-Dolwig Act with regard to joint costs and specific land costs without any assurance that the project would be reimbursed for such expenditures and that the total amount of funds originally dedicated to development of the basic water program would in fact continue to be available for water project purposes.

In order to fill this gap in project financing, Assemblyman Carley V. Porter, chairman of the Assembly Water Committee, introduced Assembly Bill 17 at the 1964 Session of the Legislature. This legislation, however, was referred to the Rules Committee for assignment to interim committee for study.

Public hearings were held by the Assembly Water Committee during the following interim and in 1965 the Assembly Committee issued a report recommending the enactment of legislation to provide for the continuing funding of joint allocated costs of the water project and of the specific recreation land costs.

The committee's recommendations were contained in Assembly Bill 1147 (Porter) of the 1965 Regular Session. This bill was passed by the Legislature but was vetoed by the Governor because of amendments which were inserted into the legislation to also provide for additional and continuing funding of the Davis-Grunsky program.

Finally in 1966, Assembly Bill 12 (Porter) was enacted into law dedicating \$5 million annually of the oil and gas revenues received by the State from the Long Beach-East Wilmington oil field to repayment of the nonreimbursable joint recreation and fish and wildlife joint costs and the specific recreation land costs of the State Water Project.

This legislation contained a provision, which was a logical extension of recommendations made by the Senate Fact Finding Committee on Water Resources in their March 1960 report, requiring that the Department of Water Resources submit their proposed cost allocations to the Legislature for approval.

This legislation further specified that no part of the **\$5 million** annually appropriated to the department to reimburse the project for expenditures made for recreation and fish and wildlife enhancement would be available for expenditure by the department until the Legislature specifically approved the department's cost allocation and then *only in the amount of the approved allocation*.

CONCLUSIONS AND RECOMMENDATIONS

Arriving at the conclusions and recommendations contained herein has been a painstaking task. Persuasive arguments have been presented upon the problems before the committee, the ultimate resolution of which will have immediate yet far-reaching long-term effects upon the financing of the State Water Project.

The Legislative Analyst has appropriately raised several fundamental policy questions not heretofore directly and forthrightly considered by the Legislature. The resolution of these basic problems must be based on the data available in addition to careful consideration of the history of general state policy in the area of the reimbursability of project costs. It is, therefore, necessary to extrapolate from that history the basis for recommendations which will be consistent with heretofore established policy.

The committee has found particularly provocative the evaluation of the question of reimbursing the project for expenditures made from appropriations prior to the enactment of the Burns-Porter Act but which were subsequently allocated to nonreimbursable project functions. With regard to this matter we recommend what seems to be logical in terms of the overall financing of the water project and the history of that financing.

Prior to the enactment of the Davis-Dolwig Act, the authority of the Department of Water Resources to assign costs to nonreimbursable project functions was implied. In an opinion prepared for Senator Stephen P. Teale, dated November 12, 1959, the Legislative Counsel stated "... there is no existing statutory limitation upon the power of the department (Water Resources) to make certain costs of the Chapter 1762 (Burns-Porter Act) facilities nonreimbursable."⁴

It should be noted that prior to the enactment of legislation specifically providing the department authority to assign costs to nonreimbursable recreation and fish and wildlife purposes and to specifically provide a separate source of financing for such costs, it was the department's intention through bookkeeping procedures to account for nonreimbursable expenditures through the California Water Fund due to the fact that such funds, under law, did not have to be repaid.

In this regard the department stated:

"... there is no requirement that California Water Fund money be repaid either with or without interest. To the extent that California Water Fund money is used for the reimbursable costs of state water facilities, the department considers that it too should be repaid with interest, and we are proceeding on that basis in contract negotiations.

"As a practical operating procedure, both bond money and California Water Fund money will be used for financing the construction of state water development facilities or for loans and grants for local water projects as required. Accounting procedures will separate reimbursable and nonreimbursable costs for purposes of pricing of project services to repay reimbursable costs with interest. In project accounting, only California Water

⁴ *Ibid.*, p.76.

Fund money will be considered to have been used for nonreimbursable recreation costs, while both California Water Fund money and bond money will be considered as to have been used for reimbursable costs.”⁵

As noted in the 1960 report of the Senate Fact Finding Committee on Water Resources, which recommended the establishment of a clear policy as to the assignment of project costs and the establishment of separate funding for such costs, “Section 233 of the Water Code does indicate a definite legislative intent to make cost of facilities for public recreation and preservation and enhancement of fish and wildlife nonreimbursable from project revenues.”⁶

The committee cited the David-Grunsky Act as “a further indication of legislative intent on the general subject of nonreimbursability of some project costs . . . ”⁷ The committee noted that this act in combination with the Burns-Porter Act authorized the outright grant of bond funds for recreation and fish and wildlife development in connection with local water development projects.

While the matter is not clear cut, it appears to this committee that all expenditures made by the Department of Water Resources which are properly allocable to nonreimbursable project functions should be repaid to the project. The committee can see little difference between bond and nonbond sources of funding for the project and inasmuch as appropriations made prior to the enactment of the Burns-Porter Act are as much a part of the total financing of the project as are funds made available by that act, we can find no reason why prior expenditures which are properly allocable to nonreimbursable project functions should not be subject to repayment under Davis-Dolwig Act policy from AB 12 appropriations.

At the time the Burns-Porter bond proposal was being formulated by the Legislature, the prior appropriations and the continuing accruals to the California Water Fund were considered in determining the amount of bond funds which would be necessary to construct the State Water Project. Therefore, to the extent that such funds were used for joint nonreimbursable recreation and fish and wildlife enhancement purposes such use would constitute a direct diversion of funds originally dedicated to the development of a water supply project.

We, therefore, recommend that all expenditures made by the Department of Water Resources which are properly allocable to such nonreimbursable project functions be approved by the Legislature for funding in accordance with the provisions of the Davis-Dolwig Act and AB 12 appropriations.

We would emphasize that the only thing the Legislature is doing through the enactment of legislation such as SB 1046 in 1967 and SB 867 of the current session is approving the allocation of costs among the various purposes of the water project and specific recreation land costs. Such legislation has no effect other than to release funds which have heretofore been made available.

⁵ *Ibid.*, pp. 63-64.

⁶ *Ibid.*, p. 19.

⁷ *Ibid.*, p. 20.

We believe we have covered the question of whether or not it is appropriate to reimburse the project for the allocated joint costs of recreation and fish and wildlife enhancement and for specific recreation land costs which were paid from sources other than Burns-Porter bond proceeds in the above discussion.

Clearly, the use of nonbond proceeds for nonreimbursable functions between the enactment of the Burns-Porter Act and the first sale of water bonds is properly reimbursable. The use of the year 1964, which was the year of the first sale of such bonds, as recommended by the Legislative Analyst would seem inconsistent with all legislative expressions of policy. It would, additionally, result in the development of a most haphazard and confusing repayment policy.

We have in essence recommended what the analyst terms a "one pot of money" approach in approving the department's cost allocations as being the only truly consistent policy. It is his belief that the date of the transition to water bond financing in 1964 should be used as the basis for determining whether or not to reimburse the California Water Fund for expenditures allocated to joint nonreimbursable project purposes. We reject the use of this specific cutoff date as being totally inconsistent with clearly established policy.

Regarding the question of whether or not expenditures made for the acquisition of lands specifically for recreation purposes should be reimbursed to the project prior to the submission of the final cost allocation for legislative approval, we see no reason why such expenditures should not be approved.

Lands acquired specifically for recreation and fish and wildlife enhancement purposes are readily identifiable. They are clearly set forth in the project development plan. We see no reason why the approval of the department's expenditures for recreation land acquisition by the Legislature prior to the submission of the final project cost allocation should in any way commit the Legislature to future cost allocations with which it may not agree.

We feel that the Legislature is under no obligation to approve a cost allocation simply because it has previously approved the repayment of funds expended for recreation land acquisition purposes. If the Legislature does not agree with a cost allocation, it may disapprove it or, as an alternative, approve it only in part.

It should be kept in mind that such lands are being acquired by the department with project funds in accordance with policy established by the Legislature in the Davis-Dolwig Act and pursuant to a definitive plan of development. Such acquisitions are made concurrently with the acquisition of lands for other project purposes. They are acquired, in most instances, many years in advance of the completion of the project and the submission of the final cost allocation for legislative approval. Inasmuch as such lands are acquired pursuant to a detailed project development plan in which they are specifically identified and inasmuch as project funds are used for their acquisition, we see no particular reason for delaying the repayment of such expenditures several years pending the completion of the project.

If for some reason such lands later become unnecessary for the originally intended recreational purposes they may be sold and the

proceeds of the sale returned to the state for use in funding other non-reimbursable project costs.

It should be kept in mind that the continuing funding provided by AB 12 covers only the joint costs allocated to recreation and fish and wildlife enhancement and the specific recreational land costs for which water project funds were expended. Onshore recreational development costs are funded annually by the Legislature through General Fund appropriations.

LEGISLATIVE ANALYST'S POSITION

As mentioned earlier, the Legislative Analyst raised three basic policy issues before the Senate Finance Committee during consideration of Senate Bill 1046. The analyst's position is summarized here for the information of the reader. His detailed statement, as presented to the committee at its September 6, 1967 hearing, is reproduced verbatim in the appendix of this report.

As pointed out by the analyst, the basic problems which developed as a result of Senate Bill 1046 were essentially an outgrowth of the two means of financing provided by the Legislature for the State Water Project.

The State Water Project is funded both by the use of bond proceeds and by a pay-as-you-go approach involving the annual dedication of certain oil and gas revenues received by the state to the water project construction program. Additionally, another factor has been introduced which tends to complicate the problem. This relates to the appropriations made for project purposes from the General Fund and the California Water Fund (Investment Fund) prior to the passage of the Burns-Porter Act.

The Legislative Analyst notes that "... all these early appropriations were derived from money that belongs to all the people of California, that is to say, the money was not derived from a limited segment of the public such as water service contractors and earmarked for the use of that limited segment through the establishment of special funds."⁸

It is noted that the pay-as-you-go approach was the only source of funding prior to the approval of the Burns-Porter Act and involves the use of approximately \$100 million most of which were state oil and gas revenues. With the passage of the Burns-Porter Act, however, the approach changed to primarily bond financing wherein the state authorized the use of its credit for the marketing of water resources development general obligation bonds. Nevertheless, the pay-as-you-go approach was utilized until 1964 due to the fact that prior accruals of oil and gas revenues dedicated to the water development program were sufficient to fund the program until that time. Overall, about \$331,000,000 will be available for project construction from this source.

The Legislative Analyst has correctly pointed out that a small portion of the construction costs allocated to recreation and fish and wildlife enhancement at various project units was financed from money appropriated from the General Fund or the California Water Fund

⁸ Senate Committee on Water Resources Transcript of Proceedings, September 6, 1967, p. 36.

prior to the enactment of the Burns-Porter Act. This is particularly true for certain of the early project facilities such as the Frenchman and Antelope projects for which payment was sought in SB 1046.

As was previously pointed out, substantial expenditures were also made from so-called pay-as-you-go funds subsequent to the enactment and approval of the Burns-Porter Act. It is also important to note that such funds, although in substantially smaller amounts, will continue to be used throughout the entire construction period as they accrue to the California Water Fund.

It is the Legislative Analyst's position that since the use of pay-as-you-go financing, which is made up of general state revenues, constitutes a contribution to the project by the people of California as a whole, "... it doesn't seem logical for the state to be asked to pay these costs again now that construction (on Frenchman and Antelope) is completed and the final cost allocation has been made." ⁹

It is the Legislative Analyst's position that the reimbursement of funds expended for recreation or fish and wildlife enhancement from early appropriations for the project, or from funds which are clearly in the pay-as-you-go category, constitutes a second or double payment by the state for the same facilities.

With regard to the second point raised by the Legislative Analyst, that is the appropriateness of reimbursing funds allocated to recreation or fish and wildlife enhancement which were expended from the California Water Fund subsequent to the enactment of the Burns-Porter Act but prior to the first issue of Water Resource Development bonds, the analyst also feels that the reimbursement of such expenditures would constitute a double payment.

The analyst, however, acknowledges that drawing a line with respect to these funds is difficult in determining which expenditures should be reimbursed pursuant to the Davis-Dolwig Act. He notes that "If all double payments were to be avoided, the state would logically charge off all recreation and fish and wildlife enhancement expenditures against California Water Fund expenditures. Now, this obviously was not the intent of the Burns-Porter Act, and is inconsistent with all administrative and legislative actions before and after its passage. It seems clear that the intent of the Burns-Porter Act was to provide a state contribution to the state's water program through the use of the California Water Fund." ¹⁰

The problem which is before the committee, as pointed out by the analyst, is to determine whether all, none, or a portion of the so-called pay-as-you-go expenditures made from the California Water Fund and subsequently allocated to nonreimbursable recreation and fish and wildlife enhancement functions are to be reimbursed under AB 12.

The analyst recommended "... that the cutoff date for allowing the repayment of California Water Fund expenditures for recreation and fish and wildlife enhancement be the transition to water bond financing in 1964." ¹¹

The third, or last, policy question raised by the analyst concerned the question of whether or not reimbursement should be provided

⁹ *Ibid.*, p. 43.

¹⁰ *Ibid.*, p. 44.

¹¹ *Ibid.*, p. 46.

for expenditures made by the Department of Water Resources exclusively for the acquisition of lands for recreation and fish and wildlife enhancement purposes prior to the allocation of costs for the project features involved.

It was the analyst's concern that the approval of expenditures made for specific recreation land acquisition costs in advance of the submission of the cost allocation for legislative approval might "... tend to commit the Legislature to future cost allocations with which it may not agree."¹²

DEPARTMENT OF WATER RESOURCES' POSITION

The position of the department is summarized as follows:

"1. Under the Davis-Dolwig Act, as amended by Chapter 27, Statutes of 1966, it is clear that the Department is required to allocate and to report to the Legislature annually on all non-reimbursable costs of the State Water Project, not just those expended from bond proceeds. I think this is an important point, Mr. Chairman.

2. It is equally clear that the function of the Legislature is to review all the cost allocations made by the department, not just those allocated from bond proceeds, and to approve or disapprove on the basis of whether the costs were properly allocated.

3. An approval of the cost allocations by the Legislature does not result in a "double payment" or "double contribution" by the state for the same purpose.

4. The law is also clear that the department is to report, and the Legislature is to review for approval or disapproval the specific recreation land costs annually, rather than upon the final allocation of joint costs.

5. The department supports the policy inherent in the present law and recommends that it not be amended to carry out the recommendations of the Legislative Analyst."¹³

It is the department's position that the basic intent of the Davis-Dolwig Act was to make the financing of the water project "whole" by providing separate financing for all nonreimbursable costs of the project thus leaving all other funding, including water bonds, the California Water Fund, and the appropriations made prior to the enactment of the Burns-Porter Act available for financing the reimbursable costs of the project.

The department's detailed statement, as is the Legislative Analyst's, is published verbatim in the appendix of this report.

¹² *Ibid.*, p. 49.

¹³ *Ibid.*, p. 8.

APPENDICES

APPENDIX I

STATEMENT OF THE LEGISLATIVE ANALYST

STATEMENT BY LEGISLATIVE ANALYST BEFORE SENATE COMMITTEE ON WATER RESOURCES

September 6, 1967

This statement is in response to a letter dated August 10 from Senator Cologne which asks for an elaboration and further explanation of the analysis we prepared for the Senate Finance Committee hearing on SB 1046. I will review background information on the general subject matter, restate the contents of our analysis and in the process answer the questions which are raised in Senator Cologne's letter.

As background for consideration of the problems presented by SB 1046 it may be helpful to note that there are basically two approaches to the financing of water resources projects. One is the use of revenue or general obligation bonds. This is normally used by districts and local agencies of government and is the primary source of funding for the State Water Project. The second approach is used by the federal government and involves the annual appropriation of tax or other general revenues to finance the construction of water projects. It is a pay-as-you-go approach. The first, or bond financing approach, is a more stringent financing mechanism in that the project and its constructing agency must find assured sources of revenue to pay principal and interest on the bonds. A default in such payments is a serious matter and could preclude the future issuance of bonds by the agency. In the case of the State of California, any water bond financing difficulties would likely be reflected also in higher interest rates for other bond issues of the state.

The second, or pay-as-you-go approach, is difficult for a local government to finance and it provides a more casual atmosphere toward repayment as exemplified by federal policies and programs. Thus, even though certain portions of federal project costs are required to be repaid by the project beneficiaries, such a repayment is frequently far in the future. If repayment is not secured it merely reduces revenues of the federal government at some indefinite future time.

I stress these differences because our problems with SB 1046 seem to result from combining these two financing mechanisms in a situation in which we lack agreement on the sources of construction funding and the repayment responsibilities for each project purpose.

The State of California made several early appropriations (pay-as-you-go) prior to the passage of the Burns-Porter Act which were used for planning, design and certain relocation and construction work. These appropriations were made initially from the General Fund and subsequently from the Investment Fund which became the California Water Fund, and expenditure was made without regard to the purpose of the project involved. We should note here that whether General

Fund or California Water Fund money, all these early appropriations were derived from money that belongs to all the people of California, that is, the money was not derived from a limited segment of the public such as water service contractors and earmarked for the use of that limited segment through the establishment of special funds. As a result, the state initially contributed approximately \$100 million to the construction of the State Water Project under the pay-as-you-go approach. With the enactment of the Burns-Porter Act the state changed its approach and primarily contributed its credit to assure the marketing of general obligation bonds to finance the rest of the project construction costs along with the dedication of the annual accruals to the California Water Fund.

There is no specific continuity between the project financing prior to the Burns-Porter Act and that provided by the Burns-Porter Act. The only essential relationship is that the water bond financing provided by the Burns-Porter Act was intended to reasonably approximate the funds necessary to complete project construction after considering any funds available in the California Water Fund. To this has subsequently been added federal contributions for flood control and under the Davis-Dolwig Act and Chapter 27, state contributions for the costs allocated to recreation and fish and wildlife enhancement.

The result is that the project construction which started out on a pay-as-you-go approach shifted to primarily bond financing and eventually became a mixture of both. Nothing in the Burns-Porter Act or other legislation basically establishes any pattern for the use of these funds for the construction of specific project purposes or relates them to any specific repayment pattern. They can legally be considered as one pot of money or can be logically related to project purposes on an administrative basis. In practice during recent years we have had a mixture of both the one pot and the logical approach based on expediency.

The sequence of financing actions and different sources of funding provided for the construction of the State Water Project does not necessarily present a logical pattern and tends toward a "one pot of money" approach but it need not be that way. It has generally been agreed that the revenue bonds and the general obligation bonds available under the Burns-Porter Act are the logical source of funds to construct those features of the project for which the water service contractors have a repayment responsibility. If this is done there is always provided a source of revenues to pay principal and interest on these bonds. If in addition, the federal government pays the costs allocated to flood control and the state pays the costs allocated to recreation and fish and wildlife enhancement, the project construction costs are covered. To complete the financial picture, the California Water Fund was designated several years ago to finance the Davis-Grunsky program. This was done because the Davis-Grunsky program had become primarily a grant program and if water bond proceeds are used to finance these grants there is no assured source of revenue to pay principal and interest on bonds so used.

At the time the administrative decision was made to use the California Water Fund for the Davis-Grunsky program we specifically pointed this out on page 637 of our *Analysis of the 1964 Budget*

Bill and noted that this approach would present "no future problems in finding funds to pay the principal and interest on bond proceeds so expended. The problem of paying principal and interest on any water bond proceeds disbursed for nonreimbursable construction costs (recreation and fish and wildlife enhancement) for dams and reservoirs of the state water facilities will still remain."

This latter problem was resolved eventually by the passage of AB 12, now Chapter 27 in which the Legislature set aside \$5 million per year of tidelands oil money to provide for the payment of recreation and fish and wildlife enhancement costs. With this action we viewed the financing of the project as having been completed on an orderly, logical basis, that is, with a designated source of construction funds and associated repayment provided for each purpose of the project. In practice, this approach has not been fully implemented because there have been deviations, such as last year when the department ran short of water bond proceeds and used the California Water Fund for the construction of the State Water Project.

I might emphasize that the problems of making the project financing comprehensible will become particularly acute if it is necessary for the department to come to the Legislature or for the state to get the approval of the electorate for additional financing to complete the construction of the project as has been suggested by the recent report of the Governor's Task Force, which indicates a possible deficiency of from \$300 to \$600 million in project financing. If additional financing is required, it then becomes extremely important to ascertain who is responsible for providing the financing of various portions of the project. Every effort toward clarification of the financing of the State Water Project will assist in evaluating and solving such problems as may confront the state in completing the financing and constructing of the project.

With this general background, the specific purposes and problems of Chapter 27 and SB 1046 can be considered. The Burns-Porter Act contemplated that the State Water Project would include recreation and fish and wildlife enhancement as subsequently authorized by the Davis-Dolwig Act. Chapter 27, First Extraordinary Session of 1966 transfers \$5 million annually from tidelands oil revenues to the Central Valley Project Construction Fund to pay such costs.

As construction of the State Water Project has proceeded and specific units have been completed, the Department of Water Resources has reported to the Legislature in its Bulletin 153 series the costs which it determines, through complex cost allocation processes, to be properly allocated (or chargeable) to recreation and fish and wildlife enhancement.

Pursuant to Chapter 27 the Legislature can approve those costs which it finds properly allocated to recreation and fish and wildlife enhancement for payment by the general public rather than the water service contractors. This legislative approval is expressed through a bill such as SB 1046 which releases the approved amount of money from the \$5 million per year transferred to the Central Valley Project Construction Fund and makes the money available for expenditure by the Department of Water Resources for further construction of the State Water Project.

The Legislature is not controlling what the department spends, but merely determining (after the fact in the case of construction expenditures already made) what amount of those expenditures it will pay as a general public responsibility. The department has been and still is constructing recreation and fish and wildlife enhancement features at the State Water Project prior to legislative approval of the cost allocation.

As previously discussed, the state has financed part of the construction costs of the State Water Project on a pay-as-you-go basis. This amounts to approximately \$257 million consisting of \$100 million of pre-Burns-Porter Act appropriations and \$157 million in California Water Fund money expended under authority of the Burns-Porter Act. Since the project costs being repaid with interest by the water service contractors include most of this \$257 million, to the extent that this repayment revenue is not used for debt service it will eventually accumulate as a capital surplus beginning in approximately the year 2020. The estimate of the surplus has varied widely. Originally Bulletin 132-63 estimated this surplus to be more than one billion dollars by the year 2030. Bulletin 132-66 shows \$330 million and the most recent, Bulletin 132-67 shows approximately \$510 million.

All of this surplus is appropriated by the Burns-Porter Act to construct additional project facilities. Thus, the pay-as-you-go capital contributions of the state from the General Fund and the California Water Fund provide a source of capital for the future construction of projects to serve the present and future water service contractors. In theory the state could claim this as a loan or advance to be repaid by the State Water Project to the General Fund. If this were the case, the money would become similar to the water bond proceeds which must be repaid with interest by the project to the bond purchasers.

To the extent that the pay-as-you-go contributions of the state to the project are increased or decreased, this will have an ultimate effect of increasing or decreasing the amount of this eventual surplus, all other things being equal. Under these circumstances any expenditure allocated to recreation and fish and wildlife enhancement by the department which are not covered by legislatively approved payments under Chapter 27 would tend to reduce this surplus in the year 2030.

As enacted after considerable discussion, Chapter 27 now provides that the \$5 million per year will increase the capital resources available to the Department of Water Resources to complete the construction of the initial features of the State Water Project. This is because it was decided to avoid putting the \$5 million in the California Water Fund where it would offset a like amount of water bonds for the construction of future projects to replenish the delta. Instead, the money is placed in the Central Valley Project Construction Fund where the offset provisions do not operate and it becomes a net addition to the capitalization of the initial project features.

Because the \$5 million can increase the project capitalization now and the surplus in the future and because it also very slightly reduces the amount of water bonds which must be marketed under relatively adverse current bond market conditions, both the department and the water service contractors have been anxious to secure as large and rapid release of funds allocated to recreation and fish and wildlife

enhancement pursuant to Chapter 27 as can be reasonably justified. On the other hand there are three specific problems contained in the present form and contents of that bill which we generally pointed out in our analysis of SB 1046. Specifically these problems are as follows:

1. The source of the funds for part of the construction costs allocated to recreation and fish and wildlife enhancement at Frenchman and Antelope projects, for which payment is sought in Section 1 of SB 1046, was the General Fund and the California Water Fund from legislative appropriations made prior to the passage of the Burns-Porter Act. Since this was a part of the pay-as-you-go financing of the project, it does not seem logical for the state to be asked to pay these costs again now that construction is completed and the final cost allocation has been made. Approximately \$1,305,746 of the money in Section 1 is from early appropriations which we have called double payment by the state.

2. An additional \$3,957,432 was expended from California Water Fund money under the Burns-Porter Act, but prior to the first issue of water bonds in 1964. With respect to this money it becomes difficult to draw a line determining what funds should be eligible for payment under Chapter 27 because in theory, any payment under Chapter 27 for a pay-as-you-go expenditure from the California Water Fund would be a double payment. If all double payments were to be avoided, the state would logically charge off all recreation and fish and wildlife enhancement expenditures against California Water Fund expenditures. This obviously was not the intent of the Burns-Porter Act and is inconsistent with all administrative and legislative actions before and after its passage.

It seems clear that the intent of the Burns-Porter Act was to provide a state contribution to the state's water program through the use of the California Water Fund. This was frequently referred to as "replacing the tidelands oil resource with a water resources project." The heart of the problem before this committee and the Legislature is to determine whether or not all, a portion, or none of these California Water Fund pay-as-you-go contributions will be paid a second time by the state when expended for and allocated to recreation and fish and wildlife enhancement.

The solution to this problem seems to involve determining whether Chapter 27 was intended to be used for any double payment of project costs. On this point the act is silent, principally we believe, because no such problem was considered by the Legislature. The original interest of our office in this legislation was to assure a logical, complete fiscal structure for the State Water Project. As previously discussed, this is secured if Chapter 27 is used only to the extent of paying recreation and fish and wildlife enhancement costs for which bond proceeds were expended. Our bill analysis of Chapter 27, when it was before the Legislature as AB 12, contained the following clear statement which was not disputed to the best of our knowledge, "The \$5,000,000 will pay the principal and interest on such water bond proceeds expended for nonreimbursable recreation and fish and wildlife purposes." Such a statement is not conclusive of legislative intent but

does indicate that the concept was clearly before the Legislature at the time of enactment of the bill.

There are many possible approaches that can be taken to solve this problem and the Burns-Porter Act lends itself to several interpretations which can be persuasively argued. The most broadly based solution which fits most readily into a logical fiscal structure is to accept the purpose of Chapter 27 as being to repay water bond proceeds. This gives a starting date for initiating payments under Chapter 27 based on the first expenditures of water bond proceeds commencing in 1964. This date is also consistent with the decision made at approximately the same time to finance Davis-Grunsky Act grants from the California Water Fund in order to avoid use of bond proceeds for that purpose. In view of the lack of any fully satisfactory solution to the problem of double payment and in order to move in the direction of retaining and strengthening a logical fiscal structure for the project that can be more readily understood, we recommend that the cutoff date for allowing the repayment of California Water Fund expenditures for recreation and fish and wildlife enhancement be the transition to water bond financing in 1964.

The effect of such a decision would be only to disapprove a small amount of early project expenditures. This amount would principally involve the two projects now before the Legislature in SB 1046, the South Bay Aqueduct and perhaps the Oroville Dam, depending on how the cost allocations on that feature are eventually handled. The impact on repayment by the water service contractors and the year 2030 surplus is not clear but would be nominal and, of course, the disallowance of a few million dollars will have little ultimate effect on the total capitalization of the project.

Insofar as the project water service contractors are concerned, each contract requires that each contractor repay under various formulae all of the costs of the project which are expended to provide water service for each contractor *irrespective of the source of the money used to finance the construction costs*. This contract policy was established in order to eliminate any element of water pricing subsidy and because the Burns-Porter Act provides a mechanism by which the repayment of the initial General Fund and subsequent California Water Fund expenditures on the project will accumulate as a surplus after the water service contractors have repaid their costs and will be available for the financing of additional project features to replenish the water supply in the Delta and to increase that supply as necessary. (Water Code Section 12937(b)4.)

We might note that the water service contracts provide that agencies receiving water from the state project shall advance to the Department of Water Resources the construction costs for the aqueduct turnouts and that any additional capacity sought by a contractor in the aqueduct is to be paid in advance by the contractor requesting the capacity. In a number of instances this has already occurred. The result is that for these identified project facilities the contractors are furnishing the construction costs on a pay-as-you-go basis rather than paying off water bond expenditures. We are not aware of any instances in which the contractors are proposing that they repay or pay a second time those same costs simply because the costs involve a purpose of the project.

which is generally the responsibility of the water service contractors to repay. Such a double payment on the contractors' part would be substantially similar to the proposed double payment by the state for certain recreation and fish and wildlife enhancement costs.

It seems important to keep in mind that the contractual responsibilities of the benefiting water service contractors are significantly different from the role of the state. The state is basically the financing and constructing agent for the total project but in the case of the recreation and fish and wildlife enhancement purpose, it is also responsible for payment of those costs. Therefore, where it has already paid those construction costs on a pay-as-you-go basis before water bonds were issued, it need not pay those costs again. Admittedly this results in a haphazard repayment effect based on the purpose for which the early pay-as-you-go expenditures were made. This is an existing condition which is merely being recognized. It is attributable to having made these early project expenditures before the financial structure of the entire project was developed and before cost allocations were made. It would seem inequitable and, as already pointed out, would be inconsistent with the Burns-Porter Act to go back now and recharge these expenditures to any particular project purpose. Instead we are only recommending that these expenditures be recognized for the purpose originally made.

In summary, the state's capital contribution to the project becomes whatever General Fund and California Water Fund expenditures were made for water conservation and transportation purposes. This will amount to approximately \$250 million assuming that Davis-Grunsky Act grants are paid from the California Water Fund. The payment for costs allocated to recreation and fish and wildlife enhancement pursuant to Chapter 27 is not a contribution to the project but would be a payment for project purposes added to serve the state as a whole. This payment responsibility would start with the initial date of sale of water bonds in 1964.

3. The last problem is that Section 2 of SB 1046 provides payment for the lands separately acquired exclusively for recreation and fish and wildlife purposes by the department in several instances and for which costs have not been allocated for the project features involved. For example, in the case of Oroville, the only official cost allocation is that made by agreement with the federal government in order to get the federal flood control contribution. It does not recognize recreation and fish and wildlife enhancement as a project purpose or as a basis for cost allocation. In effect, the Legislature (except for Frenchman) is being asked in Section 2 to pay for a part of the costs of several projects when the cost allocation has not yet been made on the project. This piecemeal approach may tend to commit the Legislature to future cost allocations with which it may not agree.

A basic premise of the financial structure of the State Water Project was that the funding would be exclusive of legislative control. However, it was necessary for the department to come back to the Legislature for a source of funding for the recreation and fish and wildlife enhancement costs. In providing that additional funding, the Legislature reserved to itself the decision on the extent to which it would

cover such costs. Such a determination is obviously a difficult matter because now and for several years in the future the Legislature will be determining whether to approve expenditures which have already been made.

Although the direct impact on the project of any approval or disapproval involved in SB 1046 is nominal, the precedents established may be major when extended over a number of years. Thus, there is obvious interest in the extent to which the Legislature approves cost allocations and thereby provides additional capital for the project or relieving some of the repayment obligations of the water service contractors might otherwise have to assume. The initial decisions of the Legislature in approving cost allocations pursuant to Chapter 27 will be persuasive for the department in the long run in shaping its policies and practices on cost allocations and the intent to which it will commit the state to the construction of recreation and fish and wildlife enhancement features as additions to the project.

If the Legislature should choose to increase the capitalization of the project by making further capital contributions it would appear that there are better methods of accomplishing this other than to engage in double payment of certain costs. This is particularly true at a time when the state is reevaluating the extent to which recreation and fish and wildlife enhancement features should be added to the project. It is also a relatively undesirable method of providing additional capitalization in that it provides the capital for the addition of features over which the Legislature has little control even though it is ultimately expected to pay the costs involved. Finally, the problems of SB 1046 cannot be divorced entirely from the further consideration which you will be giving in the future to the prospect of additional financing required to complete the construction of the project and to the orderly determination of the proper responsibilities to provide such financing from the several sources which may be available, i.e. General Fund contributions, additional California Water Fund money, additional general obligation or revenue bond issues or additional contributions from the water service contractors.

APPENDIX II

STATEMENT OF THE DEPARTMENT OF WATER RESOURCES

STATEMENT FOR THE SENATE COMMITTEE ON WATER RESOURCES *

By William R. Gianelli, Director
Department of Water Resources
The Resources Agency
State of California

INTRODUCTION

Thank you for the invitation to appear before your Committee today. Chairman Gordon Cologne's letter of August 11, 1967, asked for our response to five specific questions concerning the financing of the nonreimbursable costs of the State Water Project, and for a general discussion of the policy questions raised by the Legislative Analyst before the Senate Committee on Finance during hearings on SB 1046 of the 1967 Legislative Session.

I would like to start with a brief history of the problem before us today. AB 12 of the 1966 First Extraordinary Session (Calif. Statutes 1966, First Ex. Sess., Ch. 27) was passed after several years of intensive work. Its introduction and passage followed extensive legislative hearings on AB 17 of the 1964 First Extraordinary Session and AB 1147 of the 1965 Regular Session. It appropriates \$5 million a year from Long Beach tideland oil and gas revenues for the nonreimbursable joint costs of the State Water Project allocated to recreation and fish and wildlife enhancement and for the specific recreation land costs. The act requires the department to report annually to the Legislature and to obtain legislative approval of both the joint cost allocations and the specific costs for recreation lands before any of the \$5 million can be expended. Only to the extent of such approval may the funds be released for expenditure on the project. SB 1046 was introduced in the 1967 Regular Session to obtain legislative approval of recreation and fish and wildlife enhancement allocations and recreation land expenditures reported by the department to the Legislature in Bulletin No. 153-67, dated December 1966, in the total amount of \$8,260,841. The Legislative Analyst raised certain questions concerning the interpretation of Chapter 27, and as a result SB 1046 was enacted last session with language permitting release of the funds but reserving to the Legislature the right to review the allocations and expenditures in the future.

The Legislative Analyst contended that only the nonreimbursable project costs expended from bond fund proceeds may be reimbursed

* Presented in Sacramento on September 6, 1967.

to the State Water Project under the terms of Chapter 27, and that nonreimbursable project expenditures from other sources are not eligible for reimbursement to the project. He argued that such a reimbursement would constitute a "double payment" or "double contribution" by the state for the nonreimbursable costs. He also argued that specific costs for recreation lands should not be reimbursed until after final joint cost allocations are approved.

POSITION OF THE DEPARTMENT

The position of the department is as follows:

1. Under the Davis-Dolwig Act (Water Code Sections 11900 through 11925), as amended by Chapter 27, Statutes of 1966, First Extraordinary Session, it is clear that the department is required to allocate and to report to the Legislature annually on all nonreimbursable costs of the State Water Project—not just those expended from bond proceeds.

2. It is equally clear that the function of the Legislature is to review all the cost allocations made by the department—not just those allocated from bond proceeds—and to approve or disapprove on the basis of whether the costs were properly allocated.

3. An approval of the cost allocations by the Legislature does not result in a "double payment" or "double contribution" by the State for the same purpose.

4. The law is also clear that the department is to report, and the Legislature is to review for approval or disapproval the specific recreation land costs annually, rather than upon the final allocation of joint costs.

5. The department supports the policy inherent in the present law and recommends that it not be amended to carry out the recommendations of the Legislative Analyst.

ANALYSIS

History and Purpose of the Davis-Dolwig Act

The Davis-Dolwig Act (Water Code Section 11900 through 11925) was added in 1961 (Calif. Statutes 1961, Ch. 867) to those provisions of the Water Code governing the state's Central Valley Project. By reason of the cross-reference in the Burns-Porter Act (Water Code Section 12931) to the provisions of the Water Code governing the Central Valley Project "as said provisions may now or hereafter be amended", the Davis-Dolwig Act is applicable to projects constructed with funds made available by the Burns-Porter Act.

The Davis-Dolwig Act declares that recreation and the enhancement of fish and wildlife resources are among the purposes of state water projects. It specifies that costs incurred for the enhancement of fish and wildlife or for the development of public recreation shall not be included in the prices, rates, and charges for water and power, but shall be nonreimbursable costs. It requires the department to make any necessary revisions in the allocation of costs of any state water project works constructed for development of water and power, or either, resulting from expenditure of funds for recreation or fish and

wildlife enhancement. It requires that the acquisition of real property for recreation and fish and wildlife enhancement be planned and initiated concurrently with and as a part of the land acquisition program for other purposes of the project.

Finally, the act declares the legislative intent that funds necessary for enhancement of fish and wildlife and for recreation be appropriated annually from the General Fund. This includes not only the onshore recreational developments constructed and operated by the Department of Parks and Recreation as provided in the act, but also the joint costs of state water projects allocated by the department to recreation and fish and wildlife enhancement and the costs of lands acquired by the department for recreation associated with the water projects, as also required under the act.

It should be made clear that the Davis-Dolwig Act does not apply to local projects but only to projects constructed by the state itself or by the state in cooperation with the United States (Water Code Section 11905). Therefore, the Davis-Dolwig Act and our discussion today do not apply to Davis-Grunsky Act projects.

Because of the insufficiency of the General Fund, it soon became apparent that additional financing would be needed for at least some of the nonreimbursable costs of the State Water Project. The state's share of Long Beach tideland oil and gas revenues not then committed to the California Water Fund began to be considered as a possible source for such financing. AB 17 was introduced by Assemblyman Carley Porter at the 1964 First Extraordinary Session to provide such financing, but it failed of enactment due to some technical difficulties with respect to the language of the bill. The Assembly Interim Committee on Water held a hearing on the bill in Santa Monica on July 22, 1964, and the Director of Water Resources appeared at the hearing and presented the department's views. At the 1965 Regular Session a revised version, Assembly Bill No. 1147, which was fully supported by the department, was passed by the Legislature but pocket-vetoed by the Governor because of some unrelated amendments inserted in the bill on the Senate side which would have provided for future funding of Davis-Grunsky Act projects. The Assembly Interim Committee on Water again held a hearing on the subject on January 14, 1966, in Los Angeles. The director also appeared at that hearing and answered 14 specific questions on cost allocations propounded by the committee. Finally in 1966, AB 12, which was almost identical with the original AB 1147 of the 1965 Regular Session, was introduced by Assemblyman Porter and was enacted as Chapter 27, Statutes of 1966, First Extraordinary Session.

The clear purpose of Chapter 27 is to provide for financing the nonreimbursable joint costs of the State Water Project allocated to recreation and fish and wildlife enhancement and the specific recreation land costs incurred by the department. This is in fulfillment of the obligation under the Davis-Dolwig Act to provide General Fund financing for these costs. (The remaining nonreimbursable separate costs, such as the onshore recreation developments under the jurisdiction of the Department of Parks and Recreation, will continue to be financed by appropriations from the General Fund.)

Construing the Burns-Porter Act and the Davis-Dolwig Act together, it becomes clear that the purpose of Davis-Dolwig, as amended by Chapter 27, is to provide *additional capital financing* for all of the joint costs of the State Water Project allocated to recreation and fish and wildlife enhancement and for the specific recreation land costs, and that Burns-Porter Act funds and prior appropriations are to be devoted to the reimbursable costs.

I think the intent of the legislation can be made clear by a brief reference to its history. One of the predecessor bills, AB 17 of the 1964 First Extraordinary Session, did state in Section 5(e) of the bill that it was the intention of the Legislature to provide an additional \$5 million a year which would provide an additional source of financing "in order that bond proceeds need not be used for nonreimbursable costs." The department opposed AB 17, and the bill was referred to interim committee for study. At the hearing of the Assembly Interim Committee on Water in Santa Monica on July 22, 1964, the department offered a draft of a substitute bill which became the foundation of the bill finally enacted. In explaining the effect of the department's proposed bill, the Director of Water Resources, on page 4 of his statement to the committee, stated that the bill would amend the Davis-Dolwig Act:

"(c) To appropriate the money in the fund to the department on a continuing basis for expenditure, or for reimbursement of prior expenditures from the California Water Fund or the California Water Resources Development Bond Fund, on the non-reimbursable costs of the State Water Facilities to the extent cost allocations have been made by the department for such purposes and to the extent they have become effective after submission to the Legislature as set forth above; the money for expenditure or reimbursement would be transferred to the Central Valley Water Project Construction Fund so as not to result in any bond offset."

All subsequent discussions of the bill were based on this assumption. We have searched the records of the hearings and the presentations made before legislative committees. Nowhere can we find a single statement that the additional financing should be limited to reimbursement of bond fund expenditures. Throughout the hearings the assumption was that all nonreimbursable costs of the department would be covered.

For example, on January 14, 1966, before the Assembly Interim Committee on Water, former Director William E. Warne, when talking about interest costs, stated:

"Now it is true that if the bond funds are spent for the purchase of lands for recreational purposes at a reservoir site they will bear interest. We are planning to recover the water [Project] funds with interest whether it comes from the bonds or *whether it comes from the annual accrual of other revenues to the fund.*" (Emphasis added.)

As can be seen from this statement, the department believed that the purpose of the legislation was to make the State Water Project funds

whole by reimbursing all costs, including interest, allocated to the nonreimbursable recreation and fish and wildlife enhancement features of the State Water Project. At the time Mr. Warne made this statement there was no rebuttal, and an examination of the entire record leads one to believe that this was an assumption held by witnesses and legislators alike. During the same hearing, former Assemblyman Williamson made the following observation:

“Even though this money, Mr. Warne, is expended out of the water [Project] funds, which can be any fund initially from any source, and may involve interest, it is being expended for a non-reimbursable cost and therefore would never evolve upon the water user to pay.

“So that if the project fund is to be kept whole then the Legislature must sometime take action to replace these moneys, that are used in this manner, from the General Fund.”

It appears from Assemblyman Williamson's statement that the committee too assumed that reimbursement would occur for all properly allocated costs regardless of the source of funds used to construct the nonreimbursable facilities.

It is clear that under the Davis-Dolwig Act, as amended by Chapter 27, the department is required annually to allocate and to report to the Legislature on all nonreimbursable costs of the State Water Project—not just those paid from bond proceeds.

Water Code Section 11912 provides:

“. . . It shall be the duty of the department to report annually to the Legislature the costs, if any, which the department has allocated to recreation and fish and wildlife enhancement for each facility of any state water project. The department shall also report to the Legislature any revisions which the department makes in such allocations.

“The department shall submit each such cost allocation to the Department of Parks and Recreation and to the Department of Fish and Game. The Department of Parks and Recreation and the Department of Fish and Game shall file with the Department of Water Resources their written comments with respect to each such cost allocation, which written comments shall be included in the report required by this section. . . .”

The above language is broad and all-inclusive. It makes no distinction between costs paid from bond proceeds and costs paid from other funds. All costs allocated to recreation and fish and wildlife enhancement are to be included.

The function of the Legislature is to review all cost allocations made by the department—not just those allocated from bond proceeds—and to approve or disapprove on the basis of whether the costs are properly allocated.

This proposition is equally clear from the provisions of the act. Water Code Section 11912, which requires the department to report cost allocations to the Legislature, also provides:

"The allocations or revised allocations reported to the Legislature shall become effective for the purposes of Section 11915 upon approval by the Legislature." (Emphasis added.)

Here again the act refers to all the allocated costs and not just those expended from bond proceeds. All allocated costs are to be reported for approval by the Legislature, regardless of the source of funds from which they were paid.

An approval of the cost allocations by the Legislature does not result in a "double payment" or "double contribution" by the state for the same purpose.

I believe that a great deal of confusion has been caused by the use of the term "double payment" or "double contribution." As I have already pointed out, the Davis-Dolwig Act is intended to provide financing for *all* the nonreimbursable capital costs of the State Water Project, thus leaving the bond fund, the California Water Fund, and the appropriations made before Burns-Porter to be devoted to the reimbursable costs. It is important to keep this in mind. Stated another way, the purpose of the Davis-Dolwig Act is to provide additional capital financing for the entire State Water Project, as measured by the nonreimbursable costs. I think all those who supported AB 12 understood that the purpose of the bill was to obtain this additional capital financing from tideland revenues.

Thus, when the department makes expenditures under Burns-Porter for nonreimbursable costs (as it legally may do), and later it is reimbursed under Davis-Dolwig, the reimbursement is to make whole the project funds that have been reserved for financing the reimbursable costs. Such a reimbursement does not and cannot constitute a double payment for the same purpose. The purpose of one source of funding is to finance the reimbursable costs. The purpose of the other source is to finance the nonreimbursable costs.

The Legislative Analyst contends that since the state's shares of Long Beach tideland oil and gas revenues are in effect General Fund revenues of the state (an assumption with which we have no quarrel), their application toward construction of the State Water Project in amounts equal to the amounts of General Fund money and California Water Fund money previously expended on the nonreimbursable costs of the project would constitute a double payment of General Fund money for the project, and that thus the state would be making a double contribution for the nonreimbursable costs.

This argument ignores the fact that Davis-Dolwig is to provide financing for all the nonreimbursable costs of the state's project, and that the other "General Fund" money has been devoted to assist, along with the bond proceeds, in financing the reimbursable costs (and the Davis-Grunsky projects).

The second fallacy of the analyst's argument lies in his assumption that the state would be making a "double contribution" for the benefit of the water contractors. The only "contribution" the state makes, in the final analysis, is for the nonreimbursable costs. This includes the joint costs allocated to recreation and fish and wildlife enhancement and the specific cost of recreation lands. All other costs are reimbursed by the water and power users.

The ridiculousness of the argument that only bond fund expenditures should be reimbursed becomes apparent when we realize that the same expenditure which the Legislative Analyst would allow if made from bond proceeds would be disallowed if made from California Water Fund money. Thus, the eligibility of the expenditure would depend upon the status of the California Water Fund at the time it was made. For example, if the department purchased lands for recreation early in the fiscal year when California Water Fund money was available to make the purchase, the department would not be reimbursed. If the department waited until California water funds were exhausted for that year and purchased the same land with bond proceeds, it could be reimbursed. It appears to us that the time of the year such purchases are made or the particular fund from which the costs are initially paid should not be the determining factor as to which costs are reimbursable. If it were, then by judicious timing and careful book-keeping practices, in the future all nonreimbursable costs could be charged to bond proceeds. Thus, we could arrive at the same result, so far as reimbursability is concerned, as though no distinction were made as to the source of the original payment.

Specific costs of recreation lands acquired pursuant to Davis-Dolwig are to be reported for approval annually by the Legislature.

As I have pointed out above, the purpose of Chapter 27 is to meet the state's obligation under Davis-Dolwig to provide General Fund financing for recreation lands and the joint costs allocated to recreation and fish and wildlife enhancement. Prior to Chapter 27, it was contemplated that annual appropriations would be budgeted from the General Fund (Section 11913). Section 11912, added by Chapter 27, requires the department to report to the Legislature "on any expenditure of funds for acquiring rights-of-way, easements and property pursuant to Section 346 for recreation development associated with such (state water) facilities," and provides that, for the purpose of reimbursing the department, "such expenditures shall become approved in the same manner as provided above with respect to cost allocations"; that is, by annual approval by the Legislature.

The expenditures reported by the department under these provisions are for lands to be used exclusively for recreation or fish and wildlife enhancement purposes associated with the State Water Project, and are not included in the joint costs. While the joint cost allocations may be affected by the extent of recreational development made on these lands, the cost of these lands is a fixed figure and will not be affected at all by the cost allocations. Thus not only is the law clear that these specific costs are to be reported and reviewed annually, but also there is no logical reason why approval should be postponed until joint costs are allocated.

The department supports the present law and recommends that it not be amended to carry out the policy of the Legislative Analyst.

It seems clear from the above discussion that there is no ambiguity in the present law, and that what the Legislative Analyst is really arguing is that the existing law should be amended.

The department believes that the policy of the present law is sound and should not be amended at this time. Under the water and power

supply contracts, all reimbursable costs are to be repaid by the water and power users. Under the third and fourth priorities set up in the Burns-Porter Act, for use of project revenues, these repayments, to the extent they are in excess of the amounts required for operation and maintenance and repayment of principal and interest on the bonds, will be used for additional construction of water projects to meet the state's future requirements (Water Code Section 12937). If, as now contemplated under Davis-Dolwig, funds expended under Burns-Porter for nonreimbursable costs are made whole so that in effect all Burns-Porter funds are allocated to payment of reimbursable costs, this will mean not only that additional capital funds are made available now for present requirements but also that a fund will be made available for future needs. We believe it was a wise policy to establish this continuing financing for future water requirements.

The Legislative Analyst seems to be concerned about the condition of the General Fund in 2030, admitting that a change in the policy of the present law would have no immediate impact, assuming the continuation of the \$5 million annual appropriation made by Chapter 27. I can only add that if by 2030 the Legislature believes that too much "General Fund" money is going into water development, it can simply cut off the Chapter 27 appropriation at that time, or even sooner if such a situation should ever develop.

Having stated the department's position, I will now answer as briefly as possible the specific questions propounded in Senator Cologne's letter. The information you have asked for is as follows:

"1. A detailed review, beginning with the first major construction appropriation, of the development of legislative policy, including departmental recommendations thereon, with regard to the role of recreation and fish and wildlife enhancement in the State Water Project and the financing thereof."

The first expression of legislative policy to have a major bearing on the role of recreation and fish and wildlife enhancement in the State Water Project, appeared in the State Water Resources Act of 1945 (Calif. Statutes 1945, Ch. 1514). A portion of that act (as codified in Water Code Section 12581) states that:

"In studying water resources development projects, full consideration shall be given to all beneficial uses of the State's water resources, including . . . preservation and development of fish and wildlife resources, and recreational facilities, but not excluding other beneficial uses of water . . ."

The State Water Resources Act was the expression by the Legislature which initiated studies leading to the preparation of the California Water Plan. Thus, the department has been under directive from the Legislature to give full consideration to recreation and to fisheries and wildlife since it began work on the California Water Plan. The department took this directive seriously and quite early in that work recreation planners and fish and game biologists were added to the planning teams.

More comprehensive instructions were given by the Legislature in 1958, when Section 345 was added to the Water Code, and in 1959 when Sections 233, 346, and 1243 were added. As a result of these additions to the code, recreation and fish and wildlife conservation were prominently included in the planning of the State Water Project.

In my general discussion, I have already referred to the passage in 1961 of the Davis-Dolwig Act, and its amendment in 1966 by Chapter 27, Statutes of 1966, First Extraordinary Session. That is where we are now.

“2. A detailed, year-by-year résumé of the funds made available by the Legislature for use on the State Water Project. This should include a summary of any policy or control language included in such appropriations.”

A summary of appropriations for the State Water Project is as follows:

<i>Appropriations other than the Burns-Porter Act</i>	<i>Item</i>	<i>Chapter and Year</i>
General Fund -----	262	3/52
	253	971/53
	249(a)	1/54
	228	1/56
	419.5	1/56
	419.6	1/56
	263	600/57
	253	11/60
	266	888/61
	263	1/62
Investment Fund and California Water Fund -----	-	15/57
	417	600/57
	-	2252/57
	257	1/58
	257.1	1/58
	425	1/58
	262	1300/59
	382	1300/59
	383	1300/59
	383.5	1300/59
	384	1300/59
	386	1300/59
	387	1300/59
	388.1	1300/59
	389	1300/59
	-	1698/59
	-	1765/59
	256	11/60
	257	11/60
	258	11/60
	353	11/60
	354	11/60
	355	11/60
	262	1050/63
	262.1	1050/63
	277	2/64
<i>Burns-Porter Act appropriation</i>		
California Water Fund and California Water Resources		
Development Bond Fund -----	-	1762/59

The control language in the above appropriations made no specific reference to any policy in connection with recreation or fish and wild-life enhancement.

A summary of actual expenditures for the State Water Project from the above appropriations is as follows:

**SUMMARY OF EXPENDITURES
FOR THE STATE WATER PROJECT**

By Years and Source of Funds
To December 31, 1966

Calendar year	Appropriations other than the Burns-Porter Act		Burns-Porter Act appropriations		Total
	General Fund	Investment Fund and California Water Fund	California Water Fund	California Water Resources Development Bond Fund	
1952-----	\$304,580	0	0	0	\$304,580
1953-----	719,749	0	0	0	719,749
1954-----	853,124	0	0	0	853,124
1955-----	477,932	0	0	0	477,932
1956-----	1,330,752	\$519,170	0	0	1,849,922
1957-----	2,922,203	4,968,365	0	0	7,890,568
1958-----	2,359,029	10,116,090	0	0	12,475,119
1959-----	1,230,888	13,706,136	0	0	14,937,024
1960-----	1,720,695	19,345,446	\$21,250	0	21,087,391
1961-----	118,721	25,711,000	5,997,976	0	31,827,697
1962-----	35,175	8,442,909	28,299,178	\$24,429	36,801,691
1963-----	38,470	7,263,496	90,082,481	15,619,665	113,004,112
1964-----	3,194	A - 455,377	13,695,700	113,425,689	126,669,206
1965-----	1,386	A - 180,163	12,221,264	155,903,293	167,945,780
1966-----	A - 1,345	A - 55,411	6,954,013	281,838,135	288,735,392
Total-----	\$12,114,553	\$89,381,661	\$157,271,862	\$566,811,211	\$825,579,287

*These amounts represent appropriation abatements resulting principally from net refunds of condemnation deposits for prior right-of-way acquisition payments.

"3. The department's *estimate* as to the total cost, by unit, which may be allocated to nonreimbursable (recreation and fish and wildlife enhancement) project functions upon the completion of initial facilities. In this regard, we recognize that it will be impossible to precisely determine such costs until all initial facilities are completed. However, we do desire some data as to the possible range of such costs."

The department presently estimates that about \$107,300,000 of the joint capital costs of the State Water Facilities eventually may be allocated to the purposes of recreation and fish and wildlife enhancement in connection with the following respective facilities, or separable units thereof:

Frenchman Dam and Lake -----	\$1,600,000
Antelope Dam and Lake -----	4,600,000
Grizzly Valley Dam and Lake Davis -----	4,200,000
Abbey Bridge Dam and Reservoir -----	4,800,000
Dixie Refuge Dam and Reservoir -----	4,300,000
Oroville Dam and Reservoir * -----	-
California Aqueduct, including San Luis Dam and Reservoir and reservoirs in southern California † -----	54,800,000
Delta Facilities † -----	18,100,000
South Bay Aqueduct, including Del Valle Dam and Reservoir -----	14,900,000
Total -----	\$107,300,000

* An allocation for Oroville is pending discussions with the Corps of Engineers. No figure for Oroville is included in the above tabulation.

† Illustrative allocations only.

The total joint nonreimbursable costs of the State Water Facilities and the specific costs of recreation lands could range from about \$100 million to about \$150 million, considering such factors as the possible allocation of costs of additional facilities not now associated with the purposes of recreation and fish and wildlife enhancement (such as the San Joaquin Drainage Facilities and the North Bay Aqueduct), and possible changes in the final allocations to be made for those facilities listed above.

"4. If the Legislature determines that funds expended from the General Fund and the California Water Fund are allocated to recreation and fish and wildlife enhancement should *not* be reimbursed, what effect, if any, would this have upon:

- a) The financing and construction of the initial facilities;
- b) The financing and construction of additional facilities as specified in the Burns-Porter Act."

The answer to such a speculative question as this depends upon a number of assumptions. If the Legislature determines that funds expended from the General Fund and the California Water Fund, which are allocated to recreation and fish and wildlife enhancement, shall not be reimbursed, this could reduce the funds available for construction of the State Water Resources Development System in the range of from \$17,500,000 to \$26,250,000 based upon allocations to the State Water Facilities portion of the costs. Allocations for additional facilities will increase these amounts. If the appropriation made by Chapter 27 continues to be limited to \$5 million a year, it could be some 17 to 25 years, and even longer when repayment of interest cost is considered, before this reduction affects the financing of the initial facilities or the additional facilities. In that the initial facilities will be substantially completed by 1985, the impact would mainly apply to the additional facilities.

The reasons for this are as follows:

The total capital costs of the State Water Facilities are presently estimated to be \$2,470,000,000. These costs would be financed in the following manner:

Special legislative appropriations made prior to the Burns-Porter Act	\$101,000,000
Continuing appropriation of the California Water Fund under the Burns-Porter Act	331,000,000

Total use of the General Fund and the California Water Fund	\$432,000,000
Total use of all funds to finance costs of the State Water Facilities	\$2,470,000,000
Percent of total costs of the State Water Facilities to be financed by the General Fund and the California Water Fund	17.5%

Considering that the total recreation and fish and wildlife enhancement costs of the State Water Facilities may range from \$100 to \$150 million, about 17.5% thereof or \$17.5 to \$26.25 million of such costs ultimately may be financed from the General Fund and the California Water Fund and the balance of \$82.5 to \$123.75 million would be financed primarily from bond proceeds.

Assuming the present statutory limitation of \$5 million annually and excluding accrued interest charges, about 17 to 25 years would be required to cover those costs financed primarily from bond proceeds. Reimbursement of interest charges on such costs could extend this period another 10 to 15 years. After that time, the financial impact of excluding reimbursements for the General Fund and California Water Fund would be realized.

If the annual appropriation made by Chapter 27 should be increased to more rapidly cover the costs allocated to recreation and fish and wildlife enhancement, additional capital could be made available for construction of the initial State Water Facilities.

"5. Your position including supporting data on the question of 'double payment' if General Fund and California Water Fund expenditures are reimbursed pursuant to Chapter 27, Statutes of 1966. The legal basis for providing such reimbursement."

This question has already been answered in my discussion of the department's position. To summarize, there is no double payment. The law is clear that under the Davis-Dolwig Act the funds made available by Chapter 27 are to be applied to *all* the nonreimbursable joint costs and *all* the specific recreation land costs, and not to just a portion of the costs, leaving Burns-Porter funds in the final analysis to finance the reimbursable costs. The only duty of the Legislature under Chapter 27 is to review the joint cost allocations made by the department, and the specific recreation land costs, and to approve or disapprove on the basis of whether they were properly made. If the Legislature, like the Legislative Analyst, is concerned about the condition of the General Fund in 2030, and believes that General Fund money should not be used for meeting the future water requirements of the state, it can cut off the appropriation made by Chapter 27, either in 2030 or at any other time it deems it appropriate. The department believes that the present law is sound and should not be amended to limit financing in the manner advocated by the Legislative Analyst.

STATE OF CALIFORNIA

JOINT LEGISLATIVE COMMITTEE FOR REVISION OF THE PENAL CODE

Tentative Draft No. 2

SUBJECTS COVERED:

- Division 3. Disposition of Offenders
 - Division 4. General Principles of Liability
 - Division 5. Exemptions and Defenses
 - Division 7. Specific Offenses
 - Division 10. Crimes Against Life and Security of Person
 - Division 11. Crimes Against Sexual Morality, Public Decency and the Family
-

June 1968

Joint Legislative Committee for the Revision of the Penal Code
Project Office: School of Law (Boalt Hall)
University of California, Berkeley

JOINT LEGISLATIVE COMMITTEE FOR REVISION OF THE PENAL CODE

Senate

Donald L. Grunsky, Chairman
Anthony C. Beilenson
Clark L. Bradley
George C. Deukmejian
Robert J. Lagomarsino

Assembly

W. Craig Biddle, Vice Chairman
Walter J. Karabian
John J. Miller
Carlos J. Moorhead
Alan Sieroty

Frederick H. Ebey, Counsel

ADVISORY BOARD

Edward L. Barrett, Jr.

Dean of the School of Law, University of California, Davis

Richard S. Buckley

Public Defender, Los Angeles County

Lewis Drucker

Judge of the Superior Court, Los Angeles County

Folger Emerson

Judge of the Superior Court, Alameda County

Kit L. Nelson

District Attorney of Kern County, Bakersfield

Arlo E. Smith

Chief Assistant Attorney General, San Francisco

Keith C. Sorenson

District Attorney of San Mateo County, Redwood City

Gregory S. Stout

Attorney at Law, San Francisco

Arthur H. Sherry, Chairman

Project Director

PROJECT STAFF

Arthur H. Sherry, Project Director

University of California School of Law, Berkeley

William Cohen, Special Consultant

University of California School of Law, Los Angeles

Rex A. Collings, Jr., Reporter

University of California School of Law, Berkeley

Sanford H. Kadish, Reporter

University of California School of Law, Berkeley

John Kaplan, Reporter

Stanford University School of Law, Stanford

Richard A. McGee, Consultant

Institute for the Study of Crime and Delinquency, Sacramento

Elmer K. Nelson, Consultant

University of Southern California, Los Angeles

Herbert L. Packer, Reporter

Stanford University School of Law, Stanford

Murray L. Schwartz, Reporter

University of California School of Law, Los Angeles

A. LaMont Smith, Consultant (on leave)

University of California School of Criminology, Berkeley

INTRODUCTION

This is the second series of tentative drafts prepared by the research and drafting staff of the Penal Code Revision Project for submission to the Joint Legislative Committee for Revision of the Penal Code. The recommendations which it contains are tentative and subject to modification. They have not been acted upon by the Joint Committee and their publication does not imply endorsement or approval of any of its members.

The purpose of publication in tentative form at this time is to acquaint the public and those concerned in the administration of criminal justice with the work of criminal law revision in California. The project was authorized during the 1963 general session of the legislature.* The Joint Committee was established at that time and charged with the duty of making a comprehensive and thoroughgoing study of California's criminal law and criminal procedure. After a survey of similar projects elsewhere in the United States, the Committee recruited its revision staff in 1964 and directed it to prepare recommendations in accord with the Committee's general charge to revise and simplify the criminal law of California.

The work of revision is now well under way. It has as its objective the formulation of a code of criminal law, a code of criminal procedure and a corrections code. The drafts contained in this report are indicative of the general style and approach of the revision staff in the substantive criminal law area. Work is going forward concurrently on a corrections code; the draft of a procedural code will await their completion.

Comment, suggestion and criticism of the tentative draft proposals are welcome and will receive the interested attention of the Joint Legislative Committee and its staff. Communications should be sent to the California Penal Code Revision Project, School of Law (Boalt Hall), University of California, Berkeley, California 94720.

ARTHUR H. SHERRY
Project Director

EXPLANATORY NOTE: Some portions of some of the drafts are enclosed in brackets. Whenever this is done the bracketed text is provisional and subject to further staff modification or it is offered as an alternative proposal.

Where references are made to proposed sections which have not yet been drafted and numbered, the symbols XX appear in place of section numbers.

* Chap. 1797, Stats. 1963.

TABLE OF CONTENTS

DIVISION 3. DISPOSITION OF OFFENDERS

Chapter 1. Classification of Offenses; Degrees of Felonies

<i>Section</i>		<i>Statute</i>	<i>Comment</i>
200	Offense	6	7
201	Crime: Felony, Misdemeanor, Petty Misdemeanor	6	7
202	Infraction	6	7
203	Degrees of Felonies.....	11	10

Chapter 2. Sentences

204	Authorized Sentences	15	13
205	Sentence of Imprisonment for Felony: Ordinary Terms	19	15
206	Sentence of Imprisonment for Felony: Extended Terms	34	34
207	Criteria for Sentence of Extended Term of Imprisonment	34	35
208	Extended Term on Petition of the Adult Authority	35	35

DIVISION 4. GENERAL PRINCIPLES OF LIABILITY

Chapter 1. Culpability

408	Causation: Responsibility for Causing a Result	56	52
-----	--	----	----

DIVISION 5. EXEMPTIONS AND DEFENSES

Chapter 1. Lack of Culpable Mental State

500	Ignorance or Mistake.....	73	61
-----	---------------------------	----	----

Chapter 2. Mental Illness

530	Mental Illness, Disease or Defect Precluding Responsibility	91	72
531	Mental Illness, Disease or Defect: When Evidence Admissible	93	73
532	Mental Illness, Disease or Defect: Affirmative Defense, Requirement of Notice, Examination, Entry of Plea, Transfer from Inferior Court... ..	95	74
533	Psychiatric Examination and Report: Appointment of Psychiatrists.....	101	77
534	Verdict on Acquittal: Defense of Impaired Capacity	117	84
535	Verdict on Acquittal: Plea of Not Guilty by Reason of Mental Illness, Disease or Defect.....	120	85

TABLE OF CONTENTS—Continued

<i>Section</i>		<i>Statute</i>	<i>Comment</i>
536	Acquittal by Reason of Mental Illness, Disease or Defect: Release or Commitment: Petition for Discharge	121	86
537	Mental Illness, Disease or Defect: Competency to be Proceeded Against or Sentenced	136	92
538	Mental Illness, Disease or Defect: Hearing on Competency to be Proceeded Against or Sentenced	137	93
539	Determination of Competency: Proceedings and Trial: Commitment for Incompetence: Certificate of Restoration: Dismissal of Charge: Credit on Sentence	142	95
540	Competency to be Proceeded Against: Order of Hearing	154	101
	Chapter 3. Other Exemptions and Defenses		
560	Immunity	157	103

DIVISION 7. SPECIFIC OFFENSES

Chapter 1. Anticipatory and Accessorial Crimes

800	Attempt: Definition	168	112
801	Attempt: Impossibility	174	115
802	Attempt: Renunciation	177	116
805	Solicitation: Definition	180	117
806	Solicitation: Availability of Defenses	183	118
810	Conspiracy: Definition	185	119
811	Conspiracy: Multiple Criminal Objectives	189	121
812	Conspiracy: Scope	190	122
813	Conspiracy: Availability of Defenses	191	122
[814	Conspiracy: Duration]	196	125
[815	Conspiracy: Joinder; Severance; Venue]	199	126
820	Attempt, Solicitation and Conspiracy: Grading	202	127

DIVISION 10. CRIMES AGAINST LIFE AND SECURITY OF PERSON

Chapter 1. Definitions

1400	Definitions	210	135
------	-------------------	-----	-----

Chapter 2. Life

	Introduction		136
1410	Criminal Homicide	214	136
1415	Murder	214	137
[1416	Sentence of Death for Murder; Further Proceedings to Determine Sentence]	228	143
1420	Manslaughter	240	148
1425	Negligent Homicide	246	152

TABLE OF CONTENTS—Continued

Chapter 3. Security of Person

<i>Section</i>		<i>Statute</i>	<i>Comment</i>
	Introduction		161
1500	Aggravated Assault	260	162
1510	Assault	263	163
1520	Reckless Conduct	267	165
[1530	Terroristic Conduct]	269	166

DIVISION 11. CRIMES AGAINST SEXUAL MORALITY,
PUBLIC DECENCY AND THE FAMILY

Chapter 4. Obscenity

1750	Definitions	273	170
1751	Offenses	279	173
1752	Obscene Material; Inducing Acceptance	281	174
1753	Defenses	282	174
1754	Destruction of Obscene Material	284	175

Chapter 5. Prostitution

	Introduction		176
1800	Prostitution	295	181
[1801	Patronizing a Prostitute]	298	182
[1802	Inmate of a Place of Prostitution]	300	183
1803	Promoting Prostitution	302	184
1804	Abetting Prostitution	304	185
1805	Compelling Prostitution	306	186
1806	Evidence	308	187

DIVISION 3. DISPOSITION OF OFFENDERS

Chapter 1. Classification of Offenses; Degrees of Felonies.

Section 200. Offense

An offense is conduct which is prohibited by the Constitution, this code or any other statute or ordinance of this state and which is made punishable [by death or] by imprisonment or by fine.

Section 201. Crime: Felony, Misdemeanor, Petty Misdemeanor

A crime is an offense which is punishable [by death or] by imprisonment. A crime is a felony, a misdemeanor or a petty misdemeanor.

(a) It is a felony if it is punishable [by death or] by imprisonment for a term in excess of one year, unless the crime in a particular case is declared by a court to be a misdemeanor pursuant to Section XX of this code.

(b) It is a misdemeanor if it is punishable by imprisonment for a term in excess of [30] days but not in excess of one year, or if, in a particular case, it is so declared by a court pursuant to Section XX of this code.

(c) It is a petty misdemeanor if it is punishable by imprisonment for a term not in excess of [30] days.

Section 202. Infraction

An infraction is an offense which is punishable by fine, but not [by death or] by imprisonment. An infraction does not constitute a crime and conviction therefor shall not give rise to any legal disability or disadvantage based on conviction for a crime. For all procedural purposes infractions shall be treated as misdemeanors, unless otherwise specified.

COMMENT

Sections 200, 201, 202

These three sections have their counterparts in *Sections 15, 16 and 17 of the present Penal Code*. They make no

significant changes in present law, although they do lay the groundwork for important changes proposed in other sections.

The function of these sections is to define and classify various kinds of violations of the criminal law. Section 200 uses the term "offense" for the most general kind of unlawful conduct and defines it, as does the present law, in terms of its prohibition by the Constitution, this code or other enacted statute or ordinance and its punishability by death, imprisonment or fine. Of course, this does not affect any law which provides for other consequences of conviction. It simply makes it of the essence of an offense that it may be punished in the ways described. The chief effect of this section, like that of the present Section 15, is to eliminate common law crimes. Offenses are divided into two kinds, crimes and infractions. Crimes are further classified in Section 201; infractions are dealt with in Section 202.

The proposal to create a class of unlawful conduct known as an infraction, distinct from crimes proper, is new to California law. The essential distinction between an infraction and a crime is that an infraction is punishable by fine but not by imprisonment, and conviction for an infraction may not, under the express terms of Section 202, give rise to any legal disadvantage attendant upon conviction of a crime. (Again it should be noted that this definition does not exclude from the category of infractions offenses which are made punishable by such civil penalties as forfeiture or license revocation in addition to a fine.) The case for such a class of offense was well put in the commentary to the Model Penal Code (*Tentative Draft No. 2*, pp. 8, 9): "There is, however, need for a public sanction calculated to secure enforcement in situations where it would be impolitic or unjust to condemn the conduct involved as criminal. In our view, the proper way to satisfy that need is to use a category of non-criminal offense, for which the sentence authorized upon conviction does not exceed a fine . . . This plan, it is believed, will serve the legitimate needs of enforcement, without diluting the concept of crime or authorizing the abusive use of sanctions of imprisonment. It should, moreover, prove of great assistance in dealing with the problem of strict liability, a phenomenon of such pervasive scope in modern regulatory legisla-

tion. Abrogation of such liability may be impolitic but authorization of a sentence of imprisonment when the defendant, by hypothesis, has acted without fault seems wholly indefensible. Reducing strict liability offenses to the grade of violations may, therefore, be the right solution." It should also be noted that the category of an infraction provides a useful and appropriate classification for the mass of minor traffic offenses which at present are treated as crimes. See Judicial Council of California, Recommendation and Study on A System for Classifying Minor Traffic Violations as Noncriminal Traffic Infractions, Tentative Draft, May 1966.

The last sentence of Section 202 on infractions is made necessary by the fact that the provisions of the California law dealing with procedural matters (specifically those dealing with powers of arrest, pretrial and trial procedures) are geared to felonies and misdemeanors. Until some special procedural provisions are made for infractions the effect of this sentence is to make the misdemeanor provisions applicable to infractions.

Crimes are defined in Section 201 as offenses punishable by death or imprisonment and are divided into felonies, misdemeanors and petty misdemeanors. The petty misdemeanor is new in California law. Its inclusion reflects a judgment that some basis for differentiation is required of the great range of criminal conduct, varying from trivial offenses to relatively serious ones, now indiscriminately grouped as misdemeanors. Petty misdemeanors are tentatively defined as crimes punishable by not more than thirty days of imprisonment. Final judgment on this must await formulation of the provisions governing misdemeanor sentences generally. The remainder of Section 201 is substantially similar to present law, with the exception that duration of imprisonment (in excess of a year) rather than place of imprisonment (state prison) is employed to distinguish a felony from a misdemeanor following the practice in the great majority of states. Duration of imprisonment was thought a more appropriate criterion than place as an indication of the relative seriousness of crime. Moreover, there is reason to anticipate developments which will alter existing responsibilities for incarceration facilities, with the state, for example, assuming responsibility for what are now local facilities. These changes could be im-

plemented with least disturbance of the code's structure if duration of imprisonment were used as the criterion.

Paragraphs (a) and (b) of Section 201 also provide for the cases in which, pursuant to a designated section yet to be drafted, the court is authorized, much as it is under present law, to downgrade a felony to a misdemeanor. Where it does so the nature of the crime will be that which it designates.

Use of the criterion of punishability in excess of a year should serve to resolve some of the problems in classifying crimes defined in statutes other than this code which are sometimes ambiguously treated. Regardless of how the statute denominates the crime, whether as a felony or misdemeanor (or infraction) its classification will be determined by the punishment authorized. Where no punishment is explicitly authorized, as where the statute states only that the defined conduct shall be criminal, or that it shall be a felony or a misdemeanor, subsequent sections of this code, by specifying the duration of punishability in these cases, will determine the issue of classification.

Section 203. Degrees of Felonies

(1) For the purpose of sentence, felonies are classified as:

- (a) felonies of the first degree;
- (b) felonies of the second degree;
- (c) felonies of the third degree.

(2) The degree of any felony defined in this code which is unspecified shall be of the third degree.

(3) Notwithstanding any other provision of law, any crime designated as a felony or made punishable by imprisonment for a term in excess of one year by the Constitution or any statute of this state other than this code is a felony of the third degree and shall be punishable as such.

COMMENT

Section 203. Degrees of Felonies

This section, which is patterned after the proposal of the Model Penal Code, is directed at ending the proliferation of distinct punishments for each felony by substituting a scheme under which all felonies for punishment purposes

are consolidated into a limited number of categories. New York has recently done the same.

In reviewing the Penal Code and other statutes of California we have found a surprising variety of punishments authorized for felonies. This has been the product of piecemeal attention to the problem of punishment as particular crimes came under legislative scrutiny. There are presently in effect in California seven different minimum terms of imprisonment and eleven maximum terms of imprisonment. The various minima and maxima combine into approximately forty-five different prison terms for felony first offenders. As has been frequently pointed out since the Model Penal Code turned its attention to this kind of problem (and most recently by the Report of the National Crime Commission), so large a number of statutory distinctions among felony offenses is greatly in excess of those which a legislature could rationally draw on the basis of such factors as the harmfulness of the conduct and the consequent importance of deterring it, the future dangerousness of the defendant, and the expected public demand for sanctions. So large a number of legislative punishment distinctions is particularly pointless in California which in any event vests the major decisions as to parole and discharge in an administrative agency, the Adult Authority, under the California indeterminate sentencing law.

An additional defect in the present system is that it has produced numerous provisions which seem to have been passed without any reference to the sentencing provisions applicable to other offenses, with the result that the punishment for many crimes is grossly out of proportion to that for offenses of similar gravity. To cite just a few examples, the code provides a maximum sentence of life imprisonment for sodomy (*Section 286, 671*), while the maximum sentence for oral sex perversion between consenting adults is fifteen years (*Section 288a*). The maximum sentence for attempted murder generally is twenty years (*Section 664*), yet a specific provision for an attempt to murder by poison carries a minimum term of ten years and a maximum term of life imprisonment (*Sections 216, 671*). The maximum sentence for an assault with intent to commit murder is fourteen years (*Section 217*), while an assault with intent to commit rape, robbery, grand larceny, sodomy or mayhem carries a maximum sentence of twenty years. A legis-

lative punishment classification scheme of the kind proposed would tend to preclude the appearance of these anomalies.

The decision to create three degrees of felonies for punishment purposes, as in the Model Penal Code, rather than a larger number (New York now has five) rests on the judgment that three categories of relative seriousness should suffice for the purposes of legislative punishment classification. This seems especially appropriate in California with its heavy emphasis on administrative discretion in the matter of punishment, an emphasis which this code proposes to retain. It should also be noted that since the punishment for murder will be separately dealt with, there will in effect be four categories.

Paragraph (3) of Section 203 classifies all felonies defined by statutes other than this code as third degree felonies, even if a greater punishment is provided. It is borrowed from *Section 6.01 of the proposed official draft of the Model Penal Code* (hereinafter cited as Model Penal Code) where its presence is justified on the ground that "the Code should deal at least with any area of criminality involving crimes so serious that classification as a first or second degree felony for sentencing purposes is justified." An effort has been made to include within this code all the more serious crimes for which the higher punishment would be appropriate. The only major change this has required is the inclusion of the narcotic offenses within the code and their repeal from the Health and Safety Code where they are now found.

Paragraph (3) also deals with noncode crimes which designate conduct as a felony without stating the punishment. It deals with these cases by making such crimes felonies of the third degree. This carries forward the present *Penal Code Section 18* which provides: "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment in any of the state prisons, not exceeding five years."

Chapter 2. Sentences

Section 204. Authorized Sentences

(1) No person convicted of an offense shall be sentenced or otherwise dealt with except as provided by this code.

(2) The court may suspend the imposition of sentence on a person who has been convicted of a crime, in accordance with Section XX, may order him to be committed in lieu of sentence, in accordance with Section XX, or may sentence him as follows:

(a) to pay a fine as authorized by Section XX; or

(b) to be placed on probation as authorized by Section XX; or

(c) to imprisonment for the statutory term defined in Section 205 or 206, or for a term authorized by Section XX [misdemeanors]; or

(d) to fine and probation or fine and imprisonment; or

[(e) to death, as provided in Section 1416.]

(3) Where the judgment of conviction includes more than one crime the sentences imposed shall run concurrently, except as provided in Section 207(2).

(4) The court may suspend the imposition of sentence on a person who has been convicted of an infraction or may sentence him to pay a fine authorized by Section XX.

(5) This code does not deprive the court of any authority otherwise conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

COMMENT

Section 204. Authorized Sentences

This section is substantially modeled on *Section 6.02 of the Model Penal Code*. Its major significance is as follows:

1. The section encompasses the complete range of alternatives available to the judge upon sentencing. It constitutes the exclusive source of the judge's sentencing authority.

2. The section departs from California law in contemplating only suspension of sentence and not the imposition of a sentence and suspension of its execution. The reason is that when probation turns out unsuccessfully the judgment as to what alternative sentence to impose should be made afresh in light of the total situation of the offender at the time it is determined that probation failed.

3. Probation is treated as a sentence instead of as an accompaniment of suspension in order to reinforce the view of probation as an independent sanction.

4. The court is expressly authorized to suspend the imposition of sentence without placing the defendant on probation since there will be occasional cases in which the court will view the apparatus of probationary supervision as wasteful and unnecessary. The period of suspension will be specified in a section subsequently to be written (*cf. Section 301.2 of the Model Penal Code*) as will be the appropriate conditions of suspension.

5. The section also significantly departs from California law in imposing no restrictions upon the types of cases in which probation is available. There is general agreement that the attempt to impose such restrictions in California has produced a body of legislation which is self-contradictory, confused and complicated beyond comprehension. Part of the explanation for this is the impossibility of taking into account by legislative definition all the considerations and contingencies relevant to the probation judgment. As observed by the Model Penal Code, "However right it may be to take the gravest view of an offense in general, there will be cases comprehended in the definition when the circumstances were so unusual, or the mitigations so extreme, that a suspended sentence or probation would be proper. We see no reason to distrust the courts upon this matter or to fear that such authority will be abused." (*Tentative Draft No. 2*, pp. 13, 14.)

6. Subsection 3 departs from California law in disallowing consecutive sentences. Present restrictions on consecutive sentencing derive from the restrictions of *Section 654* on multiple punishment as interpreted by the Supreme Court in *Neal v. State*, 55 Cal. 2d 11, 9 Cal. Rptr. 607 (1960). As is developed in the commentary to proposed Section 207, these restrictions do not provide an adequate

legislative model. Our proposal, presented in Section 207, is to make multiple criminality in defined circumstances a basis for an extended term. In all other cases multiple punishment by consecutive sentences is precluded. The restriction is cast in terms of crimes in one judgment of conviction, therefore building upon the California Supreme Court's decisions with respect to compulsory joinder of counts. See *Kellett v. Superior Court*, 63 Cal. 2d 822, 48 Cal Rptr. 366 (1966). Insofar as loop-holes still remain, they will be met by a specially drafted joinder provision.

Section 205. Sentence of Imprisonment for Felony: Ordinary Terms

(1) A person who has been convicted of murder may be sentenced to a term the minimum of which shall be seven (7) calendar years and the maximum of which shall be life imprisonment.

(2) A person who has been convicted of any other felony may be sentenced to one of the following terms of imprisonment:

(a) in the case of a felony of the first degree, for a term whose maximum shall be life imprisonment; [for a term whose maximum shall be set by the court at either twenty (20) years or life imprisonment;]

(b) in the case of a felony of the second degree, for a term whose maximum shall be ten (10) years; [for a term whose maximum shall be set by the court at either ten (10) or seven (7) years;]

(c) in the case of a felony of the third degree, for a term whose maximum shall be five (5) years. [for a term whose maximum shall be set by the court at either five (5) or three (3) years.]

(3) In the cases of felonies of the second and third degree the term includes possible liability for an extended term pursuant to the provisions of Section 208 of this code.

(4) A person sentenced to imprisonment for a felony may not be released or discharged within six (6) months of his imprisonment.

COMMENT

Section 205. Sentence of Imprisonment for Felony:
Ordinary Terms

This section is the central provision of the proposed code governing imprisonment for felonies. It must be read, however, in conjunction with Section 206 which provides for the special classes of offenders for whom extended terms of imprisonment are appropriate.

The section reflects the judgment to retain the present law of indeterminate sentencing under which the judge is given no authority to set the minimum or the maximum term of imprisonment. While other sections will continue his authority to grant or deny probation and to determine the conditions thereof as well as his authority to reduce the grade of the offense, sentences of imprisonment are determined by the statutory terms. The term of a prisoner within the statutory limits and the date of his release on parole will continue to be determined by the Adult Authority. California has pioneered with its indeterminate sentence and the consensus of informed opinion, with which we agree, is that it should not now be discarded. Such difficulties as have arisen with it involve the exercise of the term-setting and paroling power by the Adult Authority. These difficulties will be dealt with separately in later sections of the proposed code.

The bracketed phrases in Paragraphs 2(a), (b) and (c) are offered as a possible modification of the indeterminate sentencing law in a limited way. Those provisions would allow the judge a limited and confined role in determining the maximum. He would have two options within each felony grade. For a first degree felony he could choose between a life and a twenty year maximum; for a second degree felony between a ten and a seven year maximum; for a third degree felony between a five and a three year maximum. The case in favor of this limited departure from the indeterminate sentencing law rests primarily on the need to provide some basis for distinguishing the great variety of offenders and offenses in each of the three categories. A maximum of ten years, for example, may be just for some second degree felonies, but grossly excessive for others, given all the factors of the case and the criminal. Therefore, the judge should

have the power to impose a lesser maximum more just under the circumstances. While some potential disparity will be introduced by this proposal, it is kept at a minimum by confining the judge to only two options. In any event, justice requires that this concession be made. The whole system of legislative gradation of punishment rests upon the judgment that limits should be placed by law on how long a prisoner may be subjected to the penal-correctional administrative regime and that such limits should vary with the seriousness of the offense and of the criminal. In an earlier section only three such legislative gradations were proposed. But the reason was not that the world of criminals and criminality were so little undifferentiated, but because legislatures, from their removed and generalized perspective, were not in a position to make such differentiations. Judges, however, are in a position to make such judgments on the facts of particular cases.

Since the Adult Authority in the great majority of cases releases prisoners long before their maximum terms, it is reasoned that the alternative proposal would not constitute a significant interference with the discretion of that agency.

The case against rests upon an apprehension of re-introducing into California a widespread source of sentencing disparity elsewhere and a judicial reluctance, of which there is some evidence, of being given back this term-setting authority, even on so reduced a scale.

A majority of the Reporters do not favor the bracketed alternative. It is preserved in the proposed draft, however, because it may prove useful in the event that the legislature prefers to alter the scheme of punishment categories here proposed.

In establishing authorized terms of imprisonment for felonies it was thought desirable to set out a separate term for murder. This is the one crime which this code may continue to make punishable by death. It represents the most serious crime in the law. To assimilate it to even the highest degree of felony would have tended to create distortions in the terms authorized for other felonies. Section 205(1), therefor, authorizes a maximum term of life imprisonment and a minimum term of seven

years for murder. This substantially reproduces present California law under which a person serving a life term for murder may be released on parole after seven years.

For all other felonies the authorized maximum terms are life for first degree felonies, ten years for second degree felonies, and five years for third degree felonies. Under present California law there are a total of eleven maximum terms authorized for various felonies: 1 year, 2, 5, 10, 14, 15, 20, 25, 40, 50 and life imprisonment. For reasons indicated in the commentary on Section 203, we have concluded that this number is excessive and that three categories of maximum terms (in addition to that for murder) are sufficient for legislative gradation purposes. The maximums chosen (life, ten and five years) represent an approximation of present California maximum terms. The major change which this proposal would produce is that all maximums between ten years and life will be eliminated, requiring that in assigning punishment for the most serious crimes the legislature will have to choose between ten years and life. It may be expected that in all but a few cases the proposed code will opt for ten years. A prospect of imprisonment for more than ten years has virtually no deterrent impact beyond the prospect of imprisonment for ten years. It is implausible that a person who would risk imprisonment for a decade of his life in order to commit some crime would desist from doing so where the risk is a decade and a half or two decades. Beyond ten years the justification for holding a defendant should be incapacitation of a dreaded or dangerous person in the interest of public security or protection. The first degree felony should be reserved for these cases. In those instances where similar danger is indicated from an offender guilty of second or third degree felonies, the provisions of Sections 206 and 207 provide for an extended term of fifteen years. And in those cases where a similar danger is revealed during imprisonment of a second or third degree felon the provisions of Section 208 allow for extension of the term to fifteen years.

It should also be noted that the maximums here proposed would provide the Adult Authority with substantially all the discretion it needs and now exercises to

hold prisoners for relatively long terms. This conclusion is supported by the data contained in Appendix A on Time Served in Prison Prior to First Release on Parole, by Offense, 1965. A cumulative table for a full five year period is in process of preparation. However, that the 1965 figures are fairly representative would appear from the data assembled in the Manual of Statistics of the Adult Authority, prepared by the Adult Authority, March 2, 1965, which provide similar, though less detailed data, for a twenty year period, 1945-1964. In this period the median sentence for all offenses remained at about five years, the median time served prior to release on parole was somewhat over two years, and 90% of all offenders were released on parole after serving four and a half years or less. Comparable figures for selected serious crimes are reproduced in the following table:

**MEDIAN SENTENCE AND TIME SERVED IN PRISON PRIOR TO PAROLE,
MALE FELONS, 1945-1964, SELECTED SERIOUS OFFENSES**
(Rough Estimates)

Crime	Penal Code Section	Statutory Sentence (Years)	Minimum Eligibility Parole Date (Years)	Median Term ^a (Years)	Median Time Served ^b (Years)	Time Served By 90% All Offenders ^c (Years)
Murder 2d.....	190	5-Life	1.8	10	5½	8
Manslaughter.....	193	½-10	½	6	3	5½
Robbery 1st.....	211	5-Life	1.8	7	3	5½
Robbery 2d.....	213	1-Life	1	5	2½	4
Assault D/W.....	245	½-10	½	5	3	4½
Burglary 1st.....	461	5-Life	1.8	6	3	5
Burglary 2d.....	461	½-15	½	4	2	3
Forgery.....	470-480	½-14	½	4	1½	3
Rape.....	261.1 261.3	0-50, or 3-Life	½ } 1 }	6 6½	3½ 3½	6½ 6½
Lewd Acts w/Children.....	288	1-Life	1			

^a Total elapsed time between initial imprisonment and discharge, including parole time.

^b Time served in correctional institution, from initial imprisonment to first release on parole.

^c Maximum time served in correctional institution prior to first release on parole by all but 10% of offenders.

It is apparent that a maximum of ten years for each of the crimes covered in the table would have more than sufficed to allow for the Adult Authority to hold an offender as long as it might conceivably want to in the exceptional case. Any case in which even more time might be needed would no doubt involve a dangerous offender for whom express provision is made in Section 208, as indicated above, to allow the Adult Authority to hold him for an extended term of fifteen years on authorization of a court.

Turning now to the remaining feature of note in this section, the minimum, it will be seen that a flat six

months minimum is provided for all felonies, except murder. In a later provision of the code it will be provided that a person may be paroled at any time after he has served the minimum term.

This proposal is substantially in accord with the present law. A glance at the present Penal Code (see, for example, the minimum terms set out for most California offenses in Appendix A) reveals many crimes carrying a higher minimum than six months. However, the effect of *Penal Code Section 18* is to step back most minimums to six months. *Section 18(a)* provides that the minimum terms for all felonies shall be six months unless a different minimum is prescribed. And *Section 18(b)* provides that wherever a felony carries a maximum term of fifteen years or less the minimum shall be six months. This latter provision has been long construed by the Adult Authority (and acquiesced in, apparently, by the state agencies of justice) as making the minimum six months even where a higher minimum is set by the statute defining the offense. The upshot is that virtually all first offense crimes carry a six months minimum. The only exceptions are eight narcotic offenses, explicitly exempted from *Section 18(b)*, six crimes which carry maximums of more than fifteen years but less than life, and about two dozen crimes which carry a life maximum. These are all set out in Appendix B. Narcotics offenses constitute a special problem which we will have to face separately. Excluding narcotics offenses, therefore, it will be seen that in setting a six months minimum for third and second degree felonies, the effect is to continue the present law. In setting the same minimum for first degree felonies (excluding murder) the effect is to bring some thirty offenses, primarily life maximum ones, into the same pattern.

It may be observed that because many of these crimes carry a low minimum, and because in all cases, by virtue of *Penal Code Section 3049*, offenders may be released on parole after serving one-third of the prescribed minimum, the effect of the proposed change is less than might otherwise appear. In nine of these crimes, the minimum is one year; in four the minimum is two or three years, with a parole eligibility date of one year or less; in six the minimum is five years, with a one and

two-third years parole eligibility date; in three the minimum is ten years, with a three and one-third years parole eligibility date. It should be noted that the principal significance of the minimum is to set the parole eligibility date. Indeed, we will subsequently provide that all first felony releases must be by parole. Hence the relevant comparison is between our proposed six months minimum and the present parole eligibility dates. Also relevant is that a court may, under *Penal Code Section 1202b*, reduce the minimum to six months for any offender under twenty-three at the time of the crime. A final consideration which reduces the scope of the proposed change in present law is that we have retained the seven year minimum parole eligibility date for murder in Section 205(1).

It is our view that the California law will be improved by establishing the six months minimum for all crimes, including the relatively few which are now expected. Minimums of any longer duration constitute unwarranted and necessarily arbitrary restraints on the exercise of individualized judgments of the Adult Authority. Time of release should be determined at a time and under circumstances and by a body most suitable for the making of such judgments. A legislature can not possibly make this kind of informed and individualized release judgment at the time of enacting the law. The Adult Authority, on the other hand, at a time when the offender has been studied and tested and observed in a variety of environments is in a particularly suitable position to make the release judgment. In order to avoid artificial restrictions upon Adult Authority judgment the minimum should be retained at six months, and reliance placed on the maximum to signify legislative judgments of the order of severity of the offense.

Finally, reference to Appendix B will disclose three offenses which require a life sentence without possibility of parole, even though the worst offense, first degree murder does carry a possibility of parole. These are anomalies which the proposal would eliminate.

APPENDIX A

TIME SERVED IN PRISON PRIOR TO FIRST RELEASE ON PAROLE, BY OFFENSE, 1965

Offense	Penal Code §	Statutory Sentence	Minimum Eligible Parole Date (Yrs.)	Time Served (Yrs.)			Total Number Released			
				Median	Middle 80%	Top 10%			½	1
Murder, 1st.....	190	Life/ Death	7	11	8-16.5	17.5-43.5	34	% #		
Kidnap for Robbery or Ransom.....	209	Death or Life w/o Par.					4	% #		
Kidnap for Robbery or Ransom.....	209	Life w/ Parole					2	% #		
Habitual Criminal.....	644	Life					2	% #		
Narcotics, Sale w/like Prior Non-Felony Conv.	HS 11501	10-Life	10	4.5	3.8-6.2	6.3-8.2	62	% #		
Narcotics, Sale to Minor by Adult ..	HS 11502	10-Life	5				3	% #		
Narcotics, Sale to Minor by Adult w/1 PNFC	HS 11502	10-Life	10				2	% #		
Marijuana, Sale to Minor by Adult..	HS 11532	10-Life	5				8	% #		
Marijuana, Sale to Minor by Adult w/1 PNFC	HS 11532	10-Life	10				1	% #		
Burglary w/Explosives.....	464	10-40					1	% #		
Murder, 2d.....	190	5-Life	1.7	5.4	4-7.5	8-10.5	66	% #		
Robbery, 1st.....	213	5-Life	1.7	3.7	2.8-5.9	6-12	522	% #	.19 1	
Burglary, 1st.....	461	5-Life	1.7	3	2-7.5	5.8-13.5	112	% #		
Narcotics, Sale.....	HS 11501	5-Life	3	3.8	3-5.2	5.3-8.8	103	% #		
Marijuana Sale.....	HS 11531	5-Life	3	3	2.7-3.8	4.1-7.7	85	% #		
Marijuana Sale w/1 PNFC.....	HS 11531	5-Life	5	4	3.5-4.5	5-5.6	21	% #		
Narcotics Possession w/1 PNFC....	HS 11500	5-20	5	4.3	3-5.3	5.4-11.3	44	% #		2.2 1

Percentage and Number of Those Released Who Served Stated Years Or Less Prior to First Parole

1½	2	2½	3	3½	4	4½	5	5½	6	6½	7	7½	8	8½	9	9½	10
										2.9		5.9	8.8	14.7		23.5	32.3
										1		2	3	5		8	11
												50					
												1					
																	50
																	1
		1.6		6.4	16	56.4	69.3	83.8		93.5	95	96.7	98.4	100			
		1		4	10	35	43	52		58	59	60	61	62			
				33	100												
				1	3												
						100											
						2											
						37.5	62.5	100									
					3	5	8										
										100							
										1							
				100													
				1													
				9	10.6	22.8	31.9	53.2	57.7	69.9	77.5	88	91	94		97.2	100
				6	7	15	21	35	38	46	51	58	60	62		64	65
	1.5	5.4	30.7	40.9	64.5	75.8	84.3	87.9	91.2	93.8	95.6	96.5	97.5	97.9	98.7	99.2	
	8	28	160	213	336	395	439	458	475	489	498	503	508	510	514	517	519
	20.5	25.9	50.9	59.8	71.4	77.7	81.3	87.5	91.9	96.4	97.3		99.1				
	23	29	57	67	80	87	91	98	103	108	109		111				
		1.9	25.2	35.9	67.9	76.7	88.3	93.2	97	98		99	100				
		2	26	37	70	79	91	96	100	101		102	103				
	3.5	7	64.7	83.5	89.4	95.2		98.8					100				
	3	6	55	71	76	81		84					85				
			4.7	33	42.8	76	81	95.2	100								
			1	7	9	16	17	20	21								
4.4		6.8	15.9	38.6	45.4	61.3	82	93			95.4		97.7				
2		3	7	17	20	27	36	41			42		43				

APPENDIX A—Continued

TIME SERVED IN PRISON PRIOR TO FIRST RELEASE ON PAROLE, BY OFFENSE, 1965

Offense	Penal Code §	Statutory Sentence	Minimum Eligible Parole Date (Yrs.)	Time Served (Yrs.)			Total Number Released			
				Median	Middle 80%	Top 10%			½	1
Narcotics, Possession for Sale.....	HS 11500.5	5-15	2.5				2	% #		
Weapons in Prison.....	4502	3-Life					10	% #		
Violent Rape.....	261.3-264	3-Life	1	3.9	2.8-5.8	6-12.2	44	% #		
Sex Perversion (Child).....	288a	3-Life					12	% #		
Marijuana Possession w/1 PNFC...	HS 11530	2-20	2	2.3	2.-4	4.4-5.5	24	% #		
Arson.....	447a	2-20					7	% #		14. 1
Narcotics Possession.....	HS 11500	2-10	2	3	2-4.5	4.7-8.5	129	% #		
Marijuana Possession for Sale.....	HS 11530.5	2-10	2				8	% #		
Robbery, 2d.....	213	1-Life	1	2.9	1.9-4.5	4.6-9.4	250	% #		1. 3
Lewd Acts on Children Under 14 ...	288	1-Life	1	3.4	1.5-6.6	6.7-16.3	167	% #	.6 1	2. 4
Indecent Exposure w/like Prior....	314.1	1-Life		2.1	1.5-3.5	4-5	19	% #		5. 1
Escape From Prison With Force....	4530a	1-Life	1	3	2.4-4.8	5-7.7	61	% #		
Crime Against Nature, Sodomy....	286	1-Life					8	% #		
Bringing D.W. or Explosive into Prison or Jail	4574	1-Life					1	% #		
Incest.....	285	1-50		2.2	1.5-4.5	6.7-7.8	27	% #		
Kidnapping.....	208	1-25					12	% #		
Assault w/Intent to Rob.....	220	1-20					1	% #		

Percentage and Number of Those Released Who Served Stated Years Or Less Prior to First Parole

[illegible]

APPENDIX A—Continued

TIME SERVED IN PRISON PRIOR TO FIRST RELEASE ON PAROLE, BY OFFENSE, 1965

Offense	Penal Code §	Statutory Sentence	Minimum Eligible Parole Date (Yrs.)	Time Served (Yrs.)			Total Number Released			
				Median	Middle 80%	Top 10%			1/2	1
Assault to Rape.....	220	1-20					14	% #		
Marijuana Possession.....	HS 11530	1-10	1	1.9	1.3-3.1	3.3-6.2	162	% #	.6 1	8 13
Furnish Drugs to Minor.....	HS 11913	1-5					2	% #		
Poss. Dang. Drugs w/1 Prior or PNFC or Drug Conve.	HS 11910	1-5					7	% #		23.6 2
Rape.....	264	.5-50*					1	% #		
Statutory Rape.....	261.1 264	.5-50*	.5	2.4	1.3-4.9	5.5-6.9	37	% #		2.7 1
Attempted Rape.....	664	.5-20* .5-25*					8	% #	12.5 1	
Attempted Murder.....	664	.5-20*					2	% #		
Child Stealing.....	278	.5-20*					2	% #		
Attempted Robbery.....	664	.5-20*		2.9	2-5	7-8.5	32	% #		
Manslaughter.....	193	.5-15	.5	3	1.9-5.3	5.4-12.2	71	% #		1.4 1
Burglary, 2d.....	461	.5-15	.5	1.9	1-3.5	3.6-11.3	930	% #	1.1 10	12.9 120
Sex Perversion.....	288a	.5-15	.5	2	.8-5.1	11	15	% #		26.6 4
A.D.W. on Police Officer.....	245b	.5-15	.5				3	% #		
Assault to Commit Felony.....	221 246	.5-15 .5-5	.5				2	% #		
Forgery.....	470	.5-14	.5	1.5	1-2.5	2.6-7.3	432	% #	1.4 6	24.7 107
Fictitious Checks.....	476	.5-14	.5	1.5	1-2.6	3-3.5	31	% #	3.2 1	19.3 6

APPENDIX A—Continued

TIME SERVED IN PRISON PRIOR TO FIRST RELEASE ON PAROLE, BY OFFENSE, 1965

Offense	Penal Code §	Statutory Sentence	Minimum Eligible Parole Date (Yrs.)	Time Served (Yrs.)			Total Number Released			
				Median	Middle 80%	Top 10%			½	1
Fraud, Checks w/no Funds.....	476a	.5-14	.5	1.3	.8-2.3	2.4-5.2	255	% #	1.9 5	38.8 99
Assault w/Intent to Murder.....	217	.5-14	.5				10	% #		10 1
Mayhem.....	204	.5-14	.5				1	% #		
Perjury.....	126	.5-14	.5				3	% #		66 2
Fraudulent Possession of Completed Check	475	.5-14	.5				14	% #		35.7 5
Assault w/Deadly Weapon.....	245	.5-10	.5	2.9	1.6-5.5	6-8.3	157	% #		3.2 5
Grand Theft Embezzlement.....	487 503	.5-10	.5	1.8	1-3.1	3.3-11.1	225	% #	.4 1	18.2 41
Grand Theft Auto.....	489	.5-10	.5	1.5	.9-2.5	3.5-8.7	30	% #		16.6 5
Receiving Stolen Property.....	496	.5-10	.5	1.5	1-2.5	2.8-4.5	46	% #		17.4 8
False Imprisonment.....	236	.5-10	.5				1	% #		
Wife or Child Beating.....	273d	.5-10	.5				3	% #		66 2
Pandering.....	266i	.5-10	.5				3	% #		33 1
Pimping.....	266h	.5-10	.5				3	% #		33 1
Sale of Substance in Lieu of Drug...	HS 11503	.5-10	.5				3	% #		
Burn Insured Property.....	548 448a	.5-10	.5				4	% #		
Burn Structure, Grain, Grass.....	600 600.5	.5-10	.5				2	% #		50 1
Extortion.....	520	.5-10	.5				1	% #		

APPENDIX A—Continued

TIME SERVED IN PRISON PRIOR TO FIRST RELEASE ON PAROLE, BY OFFENSE, 1965

Offense	Penal Code §	Statutory Sentence	Minimum Eligible Parole Date (Yrs.)	Time Served (Yrs.)			Total Number Released			
				Median	Middle 80%	Top 10%			½	1
Escape Jail w/Force.....	4532 a, b	.5-10	.5				3	% #	66 2	
Bigamy.....	283	.5-10	.5				4	% #		25 1
Cruelty Toward Child.....	273a	.5-10	.5				1	% #		
Attempted Burglary, 2d.....	664	.5-7.5	.5	1.4	.8-2.3	2.4-5	24	% #		29.2 7
Forgery or Fraud of Narc. Prescription	HS 11715 11710	.5-6	.5				9	% #		
Manslaughter by Vehicle.....	193	.5-5	.5	2.4	1.7-3.1	4.2-4.6	19	% #		10.5 2
Petty Theft W/Prior.....	666 667	.5-5	.5	1.5	.9-2.3	2.5-4.5	36	% #		27.7 10
Operating Vehicle w/o Owner's Consent	VC 10851	.5-5	.5	1.5	.8-2.8	2.9-4.3	170	% #	.6 1	23.5 40
Theft of Credit Card.....	484b	.5-5	.5	1.3	.7-1.7	1.8	17	% #	5.8 1	35.3 6
Escape Jail w/o Force.....	4532b	.5-5	.5	1.5	.8-3	3.5-4.8	38	% #	7.9 3	28.9 11
D.W. Poss., Alien, Narc. Addict or Ex-Felon	12021	.5-5	.5	2.4	1.4-3.3	3.5-4	23	% #		4.3 1
Drunk Driving.....	VC 23101	.5-5	.5	1.4	.8-2.1	2.3-3.1	22	% #	4.5 1	41 9
Attempted Grand Theft.....	664	.5-5	.5				10	% #		30 3
Driving Vehicle Under Influ. of Narcotics	VC 23105	.5-5	.5				11	% #		
Administer Abortion.....	274	.5-5	.5				6	% #		16.6 1
Attempted Extortion.....	664	.5-5	.5				2	% #		50 1
Unlawful Mfg., Poss. or Sale of D.W.	12020	.5-5					8	% #		25 2

APPENDIX A—Continued

TIME SERVED IN PRISON PRIOR TO FIRST RELEASE ON PAROLE, BY OFFENSE, 1965

Offense	Penal Code §	Statutory Sentence	Minimum Eligible Parole Date (Yrs.)	Time Served (Yrs.)			Total Number Released			
				Median	Middle 80%	Top 10%			½	1
Non-Support or Desertion of Child Under 14	270 271 271a	.5-5					2	% #		100 2
Failure to Render Aid.....	VC 20001	.5-5					14	% #		50 7
Poss. of Unauthorized Narc., Drug, or Alcohol in Jail	4573.6	.5-5					2	% #		50 1
Bringing Forbidden Articles into Prison or Jail	4573 4573.5	.5-5	.5				1	% #		
Burn Uninsured Property.....	449a	.5-3	.5				2	% #		50 1
Conspiracy.....	182	.5-3	.5				5	% #		20 1
Attempt to Burn Structure.....	451a	.5-2	.5				3	% #		33 1
Escape from Jail w/o Force or Violence (misd. chg.)	4532a	.5-1 & 1 day	.5				13	% #	38 5	100 13
Insurance Frauds.....	Ins. Code						1	% #		
Other Felony.....				2	.8-4.7	5	18	% #		16. 3
								% #		
								% #		
								% #		
*Adult Authority indicates 0 minimum.								% #		

APPENDIX B

OFFENSES IN CALIFORNIA WITH MORE THAN SIX MONTHS MINIMUMS

Offense	Code Section	Statutory Range	Statutory Minimum ^a	Parole Eligibility ^b
Poss. Narcotics.....	H&S 11500.....	2-10	2*	2*
Poss. Marijuana.....	H&S 11530.....	1-10	1 ^d	1 ^d
Poss. Marij./Sale.....	H&S 11530.5.....	2-10	2*	2*
Poss. Narcot./Sale.....	H&S 11500.5.....	5-15	2½ ^d	2½ ^d
Sale Narcotics.....	H&S 11501.....	5-Life	3 ^d	3 ^d
Sale Marijuana.....	H&S 11531.....	5-Life	3 ^d	3 ^d
Sale Narcot. Minor.....	H&S 11502.....	10-Life	5 ^d	5 ^d
Sale Marij. Minor.....	H&S 11532.....	10-Life	5 ^d	5 ^d
Assault w/int. to rape, rob, etc.....	PC 220.....	1-20	1	1
Kidnapping.....	PC 208.....	1-25	1	1
Incest.....	PC 285.....	1-50	1	1
Lewd Act/Child.....	PC 288.....	1-Life	1	1
2d ^c Robbery.....	PC 213.....	1-Life	1	1
Sodomy.....	PC 286.....	1-Life	1	1
Escape Offenses.....	PC 110, 4530, 4535.....	1-Life	1	1
Assault by Prisoner.....	PC 4501.....	1-Life	1	1
Smugg. Weapon into Prison.....	PC 4574.....	1-Life	1	1
Armed D/W time of Arrest or Offense.....	PC 3024.....	2	2	2 ^c
Arson/Dwelling.....	PC 447a.....	2-20	2	2 ^c
Sex Perversion/Minor or Force.....	PC 288a.....	3-Life	3	1
Foreble Rape.....	PC 264.....	3-Life	3	1
1st ^c Robbery.....	PC 213.....	5-Life	5	12½
1st ^c Burglary.....	PC 461.....	5-Life	5	12½
2d ^c Murder.....	PC 190.....	5-Life	5	12½
Posing as Kidnaper for Ransom.....	PC 210.....	5-Life	5	12½
Poss. D/W by Prisoner.....	PC 4502.....	5-Life	5	12½
Holding Hostage Within Prison.....	PC 4503.....	5-Life	5	12½
Burglary with Explosives.....	PC 464.....	10-40	10	3½
Attempt Kill by Poison.....	PC 216.....	10-Life	10	3½
Attempt Kill Named Officials.....	PC 217.1.....	10-Life	10	3½
Kidnapping for Robbery or Blackmail.....	PC 209.....	Life	Life	7
Murder 1st ^c	PC 190.....	Life or Death	Life	7
Sabotage/Injury.....	M&V 1672a.....	Life or Death	Life	7
Assault by Lifer/Victim Survives.....	PC 4500.....	Life or Death	Life	9
Attempt Train Wreck.....	PC 218.....	Life	Life	Life
Kidnapp./Robb. Harm.....	PC 209.....			
Train Wreck/No Harm.....	PC 219.....			
Treason.....	PC 37.....			
Perjury/Death.....	PC 128.....	Death	Death	Death
Train Wreck/Injury.....	PC 219.....			
Assault Lifer/Death.....	PC 4500.....			

* Penal Code Section 18(b) states that where a statute imposes a maximum term of less than fifteen years, the minimum term shall be six months. This is construed by the Department of Corrections to reduce the minimum to six months even where the statute prescribes a higher minimum—a plausible interpretation, since Section 18(a) sets the minimum at six months “except in cases where a different minimum punishment is prescribed by any law of this State,” a provision conspicuously absent from Section 18(b). I can find no judicial interpretations or Attorney General opinions on this. My information comes from Mr. Peter Murray (Ext. 9486), Chief Records Officer of the Department of Corrections.

^b Penal Code Section 3049 provides that a prisoner may be paroled after serving the minimum term, except that any prisoner whose minimum term of imprisonment is more than one year, may be paroled at any time after the expiration of one-third of his minimum term.

^c These are narcotics offenses contained in Division 10, Health and Safety Code which, after stating the minimum and maximum, provide: “and shall not be eligible for release upon completion of sentence, or on parole or on any other basis until he has served not less than [the minimum number of years provided in the particular narcotics offense] in prison.” In view of the explicit wording the Department of Corrections reads the language as superseding Sections 18(b) and 3049, above.

^d These too are narcotics offenses contained in Division 10 of the Health and Safety Code. The statutory minimum and the eligible parole dates are explicitly stated in the Health and Safety Code provision itself to be the times indicated.

Section 206. Sentence of Imprisonment for Felony: Extended Terms

In the cases designated in Sections 207 and 208 a person who has been convicted of a felony of the second or third degree may be sentenced to an extended term of imprisonment for a term whose maximum shall be fifteen (15) years.

Section 207. Criteria for Sentence of Extended Term of Imprisonment

The court may sentence a person who has been convicted of a felony of the second or third degree to an extended term of imprisonment if it makes a finding incorporated in the record that his commitment for an extended term is necessary for protection of the public, on either of the following grounds:

(1) that the defendant,

(a) has previously been convicted of two or more felonies committed at different times when he was over the age of sixteen; and

(b) has on the present occasion been convicted of a felony under circumstances which created a danger of death or serious bodily injury to others or which involved sexually aggressive conduct toward children; and

(c) was over twenty-one years of age at the time he committed the offense for which he is now being sentenced; or

(2) that the defendant,

(a) has been convicted under a judgment of conviction which includes two or more felonies,

(i) whose maximum aggregated sentences exceed fifteen years, and

(ii) which were committed under circumstances which created a danger of death or serious bodily injury to more than one person or which involved sexually aggressive conduct against more than one child; and

(b) was over twenty-one years of age at the time he committed the offense for which he is now being sentenced.

Section 208. Extended Term on Petition of the Adult Authority

On petition of the Adult Authority to the court in which the person was originally sentenced to imprisonment [the court of the county in which the person is imprisoned] the court may extend his sentence to the term prescribed by Section 206 if it finds that such extension is necessary

for protection of the public. Such a finding, which must be incorporated in the record, shall be based on the grounds that:

(a) the person's record, both within and without the correctional system, reveals a clear pattern of assaultive or sexually aggressive behavior; and

(b) there is a substantial risk that he will at some time in the future inflict death or serious bodily injury upon another.

In making such a finding the court shall proceed upon the same basis as in an original sentencing hearing and the person shall have the same rights as any person being sentenced.

NOTE. When the Code of Criminal Procedure is drafted it should include a provision laying venue for the prosecution of multiple offenses in any county in which one of the offenses is alleged to have been committed.

COMMENT

Sections 206, 207, 208

Sections 206, 207 and 208 complete the basic structure of sentencing for felonies. They replace an elaborate and highly particularistic group of provisions in the present Penal Code that enumerate the circumstances under which felony offenders may be sentenced to terms longer than the "normal" terms prescribed for their felonies. The principal such provisions are *Sections 644, 3024 and 12022*, but there are also a number of provisions dealing with specific offenses. Their effect is summarized in the tabular presentation reproduced in Appendix A.

The present draft rejects the theory of *Sections 3024 and 12022* insofar as they accord sentencing significance to the fact of the offender's having been armed. That distinction ought to and will be directly drawn by the law defining the offense. The draft accepts the premise of *Section 644* that the fact of prior conviction ought to be relevant for sentencing purposes, but attempts to apply that premise in an intelligible and consistent manner.

The case for the extended term, *i.e.*, for a more severe disposition than would be available if the offender were simply to be sentenced for the most serious felony that he has committed upon this occasion, rests most securely upon the sentencing goal of incapacitation. The idea, very simply, is that this offender has demonstrated such dan-

gerousness that public protection is not adequately assured by sentencing him to the term ordinarily available for his felony. The releasing authorities must be given the opportunity to hold him for a longer term than would otherwise be possible.

Two principal problems are presented in the area of the extended term: (a) what should be its duration; (b) what criteria should determine its imposition. These are dealt with, respectively, in Section 206 and in Sections 207 and 208. No legislative model has been found wholly persuasive, but this draft has been more influenced by the Model Sentencing Act, prepared by the Advisory Council of Judges of the National Council on Crime and Delinquency, than by the Model Penal Code. Relevant extracts appear in Appendices B and C, respectively.

If the idea of dangerousness is taken as basic to the concept of the extended term there seems no reason to prescribe minimum terms of imprisonment. The only argument of substance for a minimum extended term is that it may prevent the paroling authorities from making a mistake. We are persuaded that a minimum high enough to meet that goal is objectionable for the same reasons advanced with respect to ordinary term minima in the Comments to Section 205.

The question, then, reduces to the length of the maximum, or maxima, that ought to be authorized for the extended term. Since Section 205 already prescribes a maximum of life imprisonment for first degree felonies, no extended term is required for that category. Given our judgment of the criteria that ought to govern the imposition of the extended term, there seems little reason to discriminate between felonies of the second and third degree. We have therefore proposed a uniform extended maximum of fifteen years for felonies of the second and third degree alike.

It should be noted that the extended term provision will need to be invoked in a very small proportion of cases. As Appendix D shows, only 1% (48 out of 4830) felony offenders first released on parole in 1965 had served a term of imprisonment of more than ten years. Of those, at least half had been convicted of offenses that under our proposed sentencing structure would be felonies of the first degree and would therefore carry a life

maximum. Of course, these few long-term prisoners are the very ones whose release excites the most public alarm, but the statistical insignificance of the problem argues for an uncomplicated extended term structure of the kind proposed here.

Section 207 proposes two criteria for the imposition of an extended term at the time of original sentencing, either one of which will suffice. Section 207(1) is addressed to the problem of the persistent offender. It accords significance to prior felony convictions if the current felony demonstrates dangerousness, restrictively defined as "circumstances which created a danger of death or serious bodily injury or which involved sexually aggressive conduct toward children." To be entirely consistent it might be desirable to require that the prior felonies also have demonstrated dangerousness. However, practical difficulties of relitigating the facts underlying prior convictions militate strongly against that requirement. Although under this formulation the court would be free to impose an extended term on an armed robber with two prior check forging convictions, it is hoped that in practice this would rarely happen.

Section 207(2) deals with the multiple offender. As a practical matter this is almost exclusively a problem of the circumstances under which aggravated punishment may be imposed for offenses arising out of the same factual setting and prosecuted in the same trial. Under present law, this problem involves the interpretation of the ban on multiple punishment in *Penal Code Section 654*, in the light of the rule laid down by the Supreme Court in *Neal v. State*, 55 Cal. 2d 11 9 Cal. Rptr. 607 (1960).

Neal had thrown gasoline into the bedroom of Mr. and Mrs. Raymond in an attempt to kill them. He was sentenced to the state prison to serve consecutive terms for one count of arson and two counts of attempted murder. In a habeas corpus proceeding the Supreme Court overturned the arson conviction because "the arson was merely incidental to the primary objective of killing Mr. and Mrs. Raymond." 55 Cal. 2d 11, 20. The court allowed both sentences for attempted murder to stand, however, on the ground that *Section 654* does not preclude multiple punishment of one act having two results each of which

is an act of violence against a separate person. *Id.* at 20-21.

The rule of the *Neal* case is epitomized in the following extract from the Supreme Court's opinion:

Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.

This so-called "intent and objective" test has been consistently followed since the *Neal* decision. It represents a coherent attempt to deal with the difficult sentencing problem that arises when, as often occurs, a criminal's conduct on a particular occasion falls into more than one legal pigeonhole. However, it cannot be regarded as a successful attempt. It is not an easy rule to apply and there has been and continues to be a large volume of appellate litigation engendered by it. Rules about sentencing should be clear and easy to apply. Because the *Neal* doctrine is not, it is very unpopular with prosecutors and judges.

There is a more fundamental question about the *Neal* test: does it adequately serve the purpose of aggravated punishment in the only situation in which it makes a practical difference, *i.e.*, the imposition of consecutive sentences?

It is submitted that it bears at best only an oblique relationship to the issue of dangerousness, which this draft treats as *the* justification for aggravated punishment. Accordingly, Section 207(2) adapts the extended term device to the situation of the multiple offender by generalizing the exception to the *Neal* rule, which permits multiple punishment for one act having two or more results each of which is an act of violence against a separate person. Section 207(2) goes beyond the *Neal* exception, however, in permitting aggravated punishment where the multiple offenses were "committed under circumstances which created a danger of death or serious bodily injury to more than one person or which involved sexually aggressive conduct against more than one child."

Multiple offenses would, under this formulation, be eligible for aggravated punishment if and only if they meet an intelligible criterion of dangerousness—risk creation to more than one person. Multiple *convictions* would continue to be authorized, *i.e.*, a person could be convicted of both rape and robbery arising from an assault on a single victim, but he could be sentenced only to the term of imprisonment authorized for the more serious of his offenses. If the multiple offenses do not satisfy the criterion of dangerousness quoted above, the offender can be sentenced only to the ordinary term of imprisonment authorized for the most serious offense of which he stands convicted. Consecutive sentences, it will be recalled, are barred by Section 204(4). The combined effect of that provision and of Section 207 is that the extended term would be the only kind of sentence imposed at the time of conviction that could result in a longer maximum than that prescribed for the most serious offense of which the defendant stands convicted on the present occasion.

These provisions for dealing with the persistent offender and the multiple offender exhaust the categories in which it seems desirable to provide for an extended term by judicial sentencing at the time of conviction. There remains the difficult problem of dangerousness manifested by an offender without a prior record or without multiple offenses. The strongest case for extended punishment is where the present offense is not a felony of the first degree but the circumstances of its commission plus the results of psychiatric examination afford relatively strong grounds for predicting that the offender is likely to endanger human life in the future. Imagine, for example, Charles Whitman arrested before he opened fire from the tower in Austin and convicted of attempted murder, a felony of the second degree. It is tempting to propose a more severe sentencing option in his case.

On balance we have rejected this form of “preventive detention” through judicial sentencing. In its place we propose a new departure in American sentencing law, as embodied in Section 208.

This provision gives the Adult Authority the power at any time before discharge to petition a court of com-

petent jurisdiction to extend a sentence to the term provided by Section 206 (fifteen years) if the person has manifested dangerousness, defined in terms that parallel those laid down for the persistent and the multiple offender by Section 207. The court would then proceed as in the original sentencing hearing and the person would be accorded the same rights as he would enjoy in such a hearing. The rationale of this provision is that the period of controlled supervision and observation that occurs in the correctional setting affords an excellent opportunity to assess the danger to life and limb that an individual may pose and that it is relevant to take into consideration for sentencing purposes the clues about probable future behavior revealed in that setting. A proceeding under Section 208 would be viewed simply as a resumption of the original sentencing hearing. To put it another way, every person sentenced to imprisonment as a second or third degree felon under Section 205 would be potentially liable to having his term extended under Section 208. Section 205(3) explicitly so states.

APPENDIX A

SUMMARY OF INCREASED, ADDITIONAL PENALTIES

Present Crime	Prior Crime	Necessary Circumstances	Sentence
Penal Code 644 Robbery First degree burglary Rape w/force or violence Arson under 447a Murder Trainwrecking Felonious assault w/deadly weapon Extortion Kidnapping Escape from prison w/force or deadly weapon Rape, fornication, sodomy, carnal abuse of child Sex crimes under 288 Assault w/intent to murder Burglary w/explosives Conspiracy to commit one of above	Penal Code 644 Robbery Burglary Burglary w/explosives Rape w/force or violence Arson Murder Assault w/intent to murder Grand theft Bribery of public official Perjury Subornation of perjury Trainwrecking Extortion Kidnapping Mayhem Escape from state prison Rape, fornication, sodomy, carnal abuse of child Sex crimes under 288 Felonious assault w/deadly weapon Feloniously receiving stolen property Conspiracy to commit one of above	Two or three prior convictions, served separate terms in state prison or federal institution	Life imprisonment
Penal Code 666(1) Felony punishable in state prison over 5 years	Petty theft	Prior conviction, served a term in penal institution or imprisonment as condition of probation	5 years to the max. sentence for present offense
Penal Code 666(2) Felony punishable in state prison 5 years or less			Up to 10 years
Penal Code 666(3) Petty theft			Felony-misd. instead of misd.
Penal Code 667 Petty theft	Any Felony		
Penal Code 3024(a) Any felony	None	Armed with weapon enumerated in Sec. 3024(f)	Minimum 2 years
Penal Code 3024(c) Any felony	Any felony	Prior conviction	Minimum 4 years
Penal Code 3024(b) Any felony	Any felony	Armed with weapon enumerated in Sec. 3024(f); Prior conviction	Minimum 4 years
Penal Code 12022 Any felony	None	Armed with weapon enumerated in 12022	5-10 years additional
Penal Code 12022 Any felony	Prior under 12022		10-15 additional
Penal Code 12022 Any felony	Two priors under 12022		15-25 additional
Penal Code 12022 Any felony	Three priors under 12022		Life, or 15-Life additional
Penal Code 12025 Carrying unlicensed, concealed fire-arm	Any felony or any prior under concealed weapons chapter, Penal Code 12000-12003	Previous conviction	Felony instead of misdemeanor
Penal Code 245 Assault with deadly weapon on peace officer	Any felony		5-15

APPENDIX A—Continued

SUMMARY OF INCREASED, ADDITIONAL PENALTIES

Present Crime	Prior Crime	Necessary Circumstances	Sentence
Penal Code 314(a) Indecent exposure	Same crime, prior under 288	Previous conviction	1-Life instead of misdemeanor
Penal Code 647a Molesting or annoying child under 18			
Penal Code 648 Counterfeiting	Same crime	Previous offense in California	Felony instead of misdemeanor
Penal Code 337.2 Touting			County jail instead of alternative fine or county jail
Penal Code 337.7 Misuse of horseracing credentials		Previous conviction	State prison instead of alternative fine or state prison
Penal Code 308 Selling tobacco or cigarettes to minors		Previous offense	Increased fine and county jail sentence

See also 311.9 of Penal Code
11500, et seq. of Health & Safety Code

APPENDIX B**MODEL PENAL CODE****Section 1.07. Method of Prosecution When Conduct Constitutes More Than One Offense.**

(1) Prosecution for Multiple Offenses; Limitation on Convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other, as defined in Subsection (4) of this Section; or

(b) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(c) inconsistent findings of fact are required to establish the commission of the offenses; or

(d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Section 6.07. Sentence of Imprisonment for Felony: Extended Terms.

In the cases designated in Section 7.03, a person who has been convicted of a felony may be sentenced to an extended term of imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than five years nor more than ten years, and the maximum of which shall be life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than five years, and the maximum of which shall be fixed

by the Court at not less than ten nor more than twenty years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be fixed by the Court at not less than five nor more than ten years.

Section 7.03. Criteria for Sentence of Extended Terms of Imprisonment; Felonies.

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two misdemeanors, committed at different times when he was over [insert Juvenile Court age] years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and:

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant has been subjected to a psychiatric

examination resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

The Court shall not make such a finding unless:

(a) the defendant is being sentenced for two or more felonies, or is already under sentence of imprisonment for felony, and the sentences of imprisonment involved will run concurrently under Section 7.06; or

(b) the defendant admits in open court the commission of one or more other felonies and asks that they be taken into account when he is sentenced; and

(c) the longest sentences of imprisonment authorized for each of the defendant's crimes, including admitted crimes taken into account, if made to run consecutively would exceed in length the minimum and maximum of the extended term imposed.

Section 7.06. Multiple Sentences; Concurrent and Consecutive Terms.

(1) Sentences of Imprisonment for More Than One Crime. When multiple sentences of imprisonment are imposed on a defendant for more than one crime, including a crime for which a previous suspended sentence or sentence of probation has been revoked, such multiple sentences shall run concurrently or consecutively as the Court determines at the time of sentence, except that:

(a) a definite and an indefinite term shall run concurrently and both sentences shall be satisfied by service of the indefinite term; and

(b) the aggregate of consecutive definite terms shall not exceed one year; and

(c) the aggregate of consecutive indefinite terms shall not exceed in minimum or maximum length the longest extended term authorized for the highest grade and degree of crime for which any of the sentences was imposed; and

(d) not more than one sentence for an extended term shall be imposed.

APPENDIX C

MODEL SENTENCING ACT

Section 5. Dangerous Offenders

Except for the crime of murder in the first degree, the court may sentence a defendant convicted of a felony to a term of commitment of thirty years, or to a lesser term, if it finds that because of the dangerousness of the defendant, such period of confined correctional treatment or custody is required for the protection of the public, and if it further finds, as provided in section 6, that one or more of the following grounds exist:

(a) The defendant is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (b) The defendant is being sentenced for a crime which seriously endangered the life or safety of another, has been previously convicted of one or more felonies not related to the instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons.

The findings required in this section shall be incorporated in the record.

Section 6. Procedure and Findings

The defendant shall not be sentenced under subdivision (a) or (b) of section 5 unless he is remanded by the judge before sentence to [diagnostic facility] for study and report as to whether he is suffering from a severe personality disorder indicating a propensity toward criminal activity; and the judge, after considering the pre-sentence investigation, the report of the diagnostic facility, and the evidence in the case or on the hearing on the sentence, finds that the defendant comes within the purview of subdivision (a) or (b) of section 5. The defendant shall be remanded to a diagnostic facility when-

ever, in the opinion of the court, there is reason to believe he falls within the category of subdivision (a) or (b) of section 5. Such remand shall not exceed ninety days, subject to additional extensions not exceeding ninety days on order of the court.

The defendant shall not be sentenced under subdivision (c) of section 5 unless the judge finds, on the basis of the presentence investigation or the evidence in the case or on the hearing on the sentence, that the defendant comes within the purview of the subdivision. In support of such findings it may be shown that the defendant has had in his own name or under his control substantial income or resources not explained to the satisfaction of the court as derived from lawful activities or interests.

Section 7. Murder

A defendant convicted of murder in the first degree shall be committed for a term of life.

Optional

Section 8. Atrocious Crimes

If a defendant is convicted of one of the following felonies—murder, second degree; arson; forcible rape; robbery while armed with a deadly weapon; mayhem; bombing of an airplane, vehicle, vessel, building, or other structure—and is not committed under section 5, the court may commit him for a term of ten years or to a lesser term or may sentence him under section 9.

Section 9. Sentencing for Felonies Generally

Upon a verdict or plea of guilty but before an adjudication of guilt the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation upon such terms and conditions as it may require. Upon fulfillment of the terms of probation the defendant shall be discharged without court adjudication of guilt. Upon violation of the terms, the court may enter an adjudication of guilt and proceed as otherwise provided.

If a defendant is convicted of a felony and is not committed under section 5 or 7 [or 8] the court shall (a)

suspend the imposition of execution of sentence with or without probation, or (b) place the defendant on probation, or (c) impose a fine as provided by law for the offense, with or without probation or commitment, or (d) commit the defendant to the custody of [director of correction] for a term of five years or a lesser term, or to a local correctional facility for a term of one year or a lesser term. Where a sentence of fine is not otherwise authorized by law, in lieu of or in addition to any of the dispositions authorized in this paragraph, the court may impose a fine of not more than \$1000. In imposing a fine the court may authorize its payment in installments. In placing a defendant on probation the court shall direct that he be placed under the supervision of [the probation agency].

APPENDIX D

LONG-TERM IMPRISONMENT AMONG CALIFORNIA OFFENDERS
FIRST RELEASED ON PAROLE, 1965

Offense	More than 5	More than 10	More than 5 but not more than 10	Number Total Released
Murder, 1st.....	34	23	11	34
Kidnap for Robbery or Ransom.....	4	4	0	4
Kidnap for Robbery or Ransom.....	2	1	1	2
Habitual Criminal.....	2	1	1	2
Narcotics w/like PNFC.....	19	0	19	62
Marijuana Sale to Minor w/1 PNFC.....	1	0	1	1
Murder, 2d.....	45	1	44	66
Robbery, 1st.....	83	3	80	522
Burglary, 1st.....	21	1	20	112
Narcotics, Sale.....	12	0	12	103
Marijuana, Sale.....	4	0	4	85
Marijuana, Sale w/1 PNFC.....	4	0	4	21
Narcotics, Possess. w/1 PNFC.....	8	1	7	44
Weapons in Prison.....	5	1	4	10
Violent Rape.....	13	2	11	44
Sex Perversion (Child).....	1	0	1	12
Marijuana Possess. w/1 PNFC.....	1	0	1	24
Narcotics Possess.....	6	0	6	129
Robbery, 2d.....	12	0	12	250
Lewd Acts on Child under 14.....	36	3	33	167
Escape from Prison with Force.....	5	0	5	61
Sodomy—Crime Against Nature.....	1	0	1	8
Incest.....	2	0	2	27
Kidnapping.....	4	0	4	12
Assault to Rape.....	5	2	3	14
Marijuana Possess.....	1	0	1	162
Statutory Rape.....	4	0	4	37
Attempted Rape.....	1	0	1	8
Attempted Murder.....	1	0	1	2
Attempted Robbery.....	3	0	3	32
Manslaughter.....	12	1	11	71
Burglary, 2d.....	16	1	15	930
Sex Perversion.....	2	1	1	15
Forgery.....	3	0	3	432
Fraud, Checks w/No Funds.....	1	0	1	255
Assault w/Intent to Murder.....	3	0	3	10
Assault w/Deadly Weapon.....	23	0	23	257
Grand Theft—Embezzlement.....	6	2	4	225
Grand Theft—Auto.....	2	0	2	30
Totals.....	408	48	360	***

Total of the Total Number Released in Each Offense.....4,830

DIVISION 4. GENERAL PRINCIPLES OF LIABILITY

Chapter 1. Culpability

Section 408. Causation: Responsibility for Causing a Result

(1) An element of an offense which requires that the defendant have caused a particular result is established when his conduct is an antecedent but for which the result would not have occurred, and,

(a) if the offense requires that the defendant intentionally or knowingly cause the result, that the actual result, as it occurred,

(i) is within the purpose or contemplation of the defendant, whether the purpose or contemplation extends to natural events or to the conduct of another, or, if not,

(ii) involves the same kind of injury or harm as that designed or contemplated and is not too remote, accidental in its occurrence or dependent on another's volitional act to have a just bearing on the defendant's liability or on the gravity of his offense;

(b) if the offense requires that the defendant recklessly or negligently cause the result, that the actual result, as it occurred,

(i) is within the risk of which the defendant was or should have been aware, whether that risk extends to natural events or to the conduct of another, or, if not,

(ii) involves the same kind of injury or harm as that recklessly or negligently risked and is not too remote, accidental in its occurrence or dependent on another's volitional act to have a just bearing on the defendant's liability or on the gravity of his offense;

(c) if the offense imposes strict liability, that the actual result, as it occurred, is a probable consequence of the actor's conduct.

(2) A defendant shall not be relieved of responsibility for causing a result if the only difference between what actually occurred and what was designed, contemplated or risked is that a different person or property was injured or affected or that a less serious or less extensive injury or harm occurred.

COMMENT

Section 408. Causation: Responsibility for Causing a Result

The problem of causation arises whenever a crime is so defined that one of the elements includes the causing of a particular result by the defendant's conduct. It most often arises in connection with homicidal crimes, where a necessary element is that the defendant have caused the death of a person. This is where the most perplexing questions have arisen, in California as elsewhere.

Though the problem of causation has given rise to complex and difficult questions, no penal code, not excluding that of California, has attempted to deal with it in statutory terms. However, the proposed formulation of the Model Penal Code (*Proposed Official Draft Section 2.03*) has made a distinct break-through. The proposed provision, while differing from the Model Penal Code in some important particulars, builds upon its essential insights.

The difficulty of the traditional judicial treatment of causation is that answers were sought in terms of factual or scientific causation. Thus the usual approach for analyzing whether to hold a defendant accountable for a death, for example, which occurs in substantially different ways than that intended or risked by the defendant, relies upon the language of factual causation: "intervening or concurrent causes," natural or human; unexpected physical conditions; distinctions between the infliction of mortal or non-mortal wounds. (*Model Penal Code, Tentative Draft No. 4, 132.*) It is true, of course, that defendant's conduct cannot be said to have caused the result where the conduct played no part whatsoever in the result. So, for example, a husband who places poison in his invalid wife's medicine cannot be said to have killed her if she dies of natural causes during the night without

touching the drink. The hard questions for the law, however, are those in which it cannot be said that his conduct played no part in the events which finally resulted in death. Certainly a defendant is not to be held for the result in all such cases. So, to vary the above example, if the wife saw the husband pour poison in her medicine, which led to a bitter altercation between them, which led to her decision to live with her aunt, whose home is destroyed by a fire which kills the wife, it is plainly unthinkable to hold that the husband killed his wife, although in a strictly factual sense, he has. On the other hand, if the wife sipped the poison and was taken to a hospital where she was improperly diagnosed and treated and ultimately died, it is not clear at all that the husband cannot be said to have killed her. Whatever the distinction between the two cases, it is not in terms of factual causation; and talk in terms of proximate cause, superceding cause, intervening cause and related concepts only conceals the central considerations which make the real difference. The object of the proposed draft is to state as clearly as possible what the basic considerations are which the court should consider in these cases, whether in deciding the issue itself or in instructing the jury.

The opening paragraph states the settled position that a pre-condition for holding the defendant for having caused a result is that his conduct contributed factually, in the sense that but for the conduct the result would not have occurred as it did.¹ The remaining sections state the additional circumstances that must be present before a defendant may be held accountable for a result. These considerations are not cast in the language of proximate cause, but in terms of the defendant's culpability. This is the central insight of the Model Penal Code, which observes: "When concepts of 'proximate causation' disassociate the actor's conduct and a result of which it was a but-for cause, the reason always inheres in the judgment that the actor's culpability with reference to the result, *i.e.*, his purpose, knowledge, recklessness or negli-

¹ The one theoretical situation in which this may not be so is that in which two independent acts, each sufficient to produce the result, occur simultaneously. An example would be the case in which two persons, independently and without the knowledge of the other, shoot the deceased simultaneously and each wound is found capable of producing instantaneous death. Rather than add to the complexity of the draft, the decision was made to remit the issue to the good sense of the courts should such a singular situation ever arise.

gence, was such that it would be unjust to permit the result to influence his liability or the gravity of the offense of which he is convicted. Since this is so, the draft proceeds upon the view that problems of this kind ought to be faced as problems of the culpability required for conviction and not as problems of 'causation'." (*Model Penal Code*, Tentative Draft No. 4, 132.)

Paragraph (1)(a) states the circumstances in which a defendant may be held for a result, of which his conduct was a but-for cause, where the offense requires that the result be intentionally or knowingly caused (murder, for example, as defined in this proposed code). Paragraph (1)(b) states what those circumstances are where the offense requires that the result be recklessly or negligently caused (manslaughter, for example). Paragraph (1)(c) deals with the case where absolute liability is imposed for a result. Paragraph (2) states the one clear case in which, whatever the mode of culpability required, a difference between what actually occurred and what was intended, contemplated or risked is not material. This is the case where the only difference is that a different person was injured or different property affected, or that less serious or less extensive injury or harm occurred. In this class of cases present law holds the defendant responsible for the result and the present draft restates this position.

Where the offense requires an intentional or knowing causing of a result, Paragraph (1)(a)(i) states that the required causal relationship is established if the actual result, in the circumstances of its occurrence, happened as the defendant designed it to happen or contemplated it would happen. This is the easy case where there is no variation between the result in mind and the result in fact. The additional clause, which makes explicit that in these circumstances the same conclusion follows whether what the defendant designs or contemplates is the action of another person or a chain of natural events, is less necessary here than in the following paragraph (as will be seen) since the sections on innocent agents (Section 450) and complicity (Section 451) would compel the same conclusion. Thus, for example, if the defendant deliberately substitutes a real, loaded gun for a stage prop gun and deceased is shot by one of the actors in a play, the

innocent agent doctrine makes the actor's conduct in shooting the gun that of the defendant himself and thus obviates any problem of causation. Similarly if the actor who shot the gun was a party to the plot, the doctrine of complicity attributes the actor's conduct to the defendant and thus again obviates any problem of causation. Nonetheless, the additional clause is desirable to retain if only because it maintains the parallel between the first and second paragraph and tends to reduce the possibility of confusion.

Paragraph (1)(a)(ii) deals with all other cases in which there is a variation between the occurrence of a result and what was intended or contemplated. These are the most troublesome cases to deal with. It is particularly in these situations that courts have instructed juries (and decided cases) in terms of direct and indirect cause and the variety of other concepts mentioned above which use the language of factual causation. The draft instead refers the issue to what in any event must be the ultimate question; namely, whether the variation is not so great that it would be just to hold the defendant for the result notwithstanding. It attempts to direct attention, however, to the issue on the basis of which the justness of holding a defendant for the result should be judged. In the case of the intervention of undesigned or un contemplated natural events, the issue is put in terms of whether the actual result, in the actual circumstances of its happening, "is not too remote or accidental in its occurrence"; in the case of the intervention of human acts, the issue is put in terms of whether the actual result "is to . . . dependent on another's volitional acts." Both tests are offered "to free the law from the encrusted precedents on 'proximate causation,' offering a principle that will permit both courts and juries to begin afresh in facing problems of this kind." (*Model Penal Code, Tentative Draft No. 4*, 135.)

It will be noted that in virtually all cases to which the above tests would be applicable the defendant would be guilty of some crime, since in each case the defendant would have intended or contemplated the infliction of injury or harm. Whether or not the causal relationship is established is generally determinative, therefore, not of the issue of criminal liability, but of whether the de-

fendant should be liable for the greater crime requiring production of the result. In the case of some undesigned or un contemplated event which alters the chain of events leading to the result (*e.g.*, the deceased dying of fright or exposure or lightning following flight after an intentional shooting), whether or not the defendant should be subjected to the higher punishment on the basis of attributing the result to his conduct must be decided in terms of whether the actual happening of the result was so remote or accidental as to have no just bearing on the gravity of the offense (or on liability, as the issue may sometimes be).

In the case of some undesigned or un contemplated act of another person which alters the chain of events leading to the result, the issue is still the justness of holding the defendant for the result, but when we speak of human intervention, the concept of remoteness and accident are inappropriate to evoke the governing considerations. It is for this reason that in these situations the test is formulated in terms of whether or not the conduct of another is "too . . . dependent on another's volitional act" to have a just bearing on punishment or liability. This language remedies what has been referred to as a major weakness of the Model Penal Code by Hart and Honore of Causation in the Law (1959) at p. 357; "It [the Model Penal Code] does not provide specifically for those cases where casual problems arise because . . . another human action besides accused's is involved in the production of the proscribed harm. These are treated merely as one kind of case where harm may or may not be 'too accidental' in its manner or occurrence . . . This is surely a weakness in a scheme which is designed to reproduce, and to allow the jury to express, the convictions of common sense that, even if harm would not have occurred without the act of accused, it is still necessary to distinguish, for purposes of punishment, one manner of upshot from another. For whatever else may be vague or disputable about common sense in regard to causation and responsibility, it is surely clear that the primary case where it is reluctant to treat a person as having caused harm which would not have occurred without his act is that where another voluntary human action has intervened." The language the draft uses for this purpose is designed to focus the court's attention upon the

extent to which the result is dependent on the volitional act of another. While it furnishes no easy formula it does, we believe, direct attention to the governing consideration in deciding a large number of the kinds of cases which have troubled courts in the past. For example, the death caused by another driving a car over the deceased who had been struck by defendant and left lying on the road (*People v. Fowler*, 178 Cal. 657, 174 Pac. 892 (1918)); that caused by the deceased himself who cut his throat while in the hospital after having been grievously wounded by defendant (*People v. Lewis*, 124 Cal. 551, 57 Pac. 470 (1889)); the medical maltreatment cases following a deadly assault by the defendant (*Hall v. State*, 199 Ind. 592, 159 N.E. 420 (1927)); the death inflicted by another while the deceased lies languishing from a serious wound inflicted by defendant (*Payne v. Comm.*, 255 Ky. 533, 75 S.W. 2d 14 (1935)).

Paragraph (1)(b) deals analogously with the case where the offense charged requires that the defendant have recklessly or negligently produced a particular result. The requirement is, of course, met where the occurrence of the result is within the risk of which the defendant was aware, in the case of recklessness, or should have been aware, in the case of negligence. In other cases the defendant is accountable so long as the actual result involved the same kind of injury or harm as that risked and, in addition, again paralleling Paragraph (1)(b), is not too remote or accidental in its occurrence or, in the case of human intervention, is not too dependent on another's volitional act to have a just bearing on the defendant's liability or on the extent of his punishment.

The language of Paragraph (1)(b) dealing with human intervention warrants a special comment, though it parallels the formulation for intentional and knowing offenses dealt with in Paragraph (1)(a). Paragraph (1)(b) states that where the offense requires that the defendant recklessly or negligently cause the result, he is responsible for having caused the result where the actual result is within the disregarded or overlooked risk, "whether that risk extends to natural events or to the conduct of another." Here this language fills a necessary function in light of the draft's earlier formulation of complicity (representing the prevailing view) which limits liability for the acts of another to those cases where the defendant

has acted intentionally or knowingly with respect to the consequences of that other's conduct. A typical example is the Russian Roulette game in which defendant and deceased take turns spinning the cylinder and clicking the revolver at themselves and the deceased shoots himself. (*Comm. v. Atencio*, 345 Mass. 627, 189 N.E. 2d 223 (1963).) Another example is drag-race in which one of the participants crashes to his death or kills another. (*Comm. v. Root*, 403 Pa. 571, 170 A.2d 310 (1961).) Another is the case of a defendant who lends his car keys to a person who he knows has no driver's license or is too drunk to drive. (*People v. Marshall*, 362 Mich. 170, 106 N.W. 2d 842 (1961).) There should be no difficulty in holding the defendant in any of these cases for an offense requiring recklessness or negligence as to the resultant death so long as it is found that the recklessly disregarded or negligently overlooked risk included the risk that the deceased would in the process cause his own or another's death. But the complicity route for holding a defendant for the deceased's death-producing conduct is not available for the reason just stated—the death is neither intended nor known, only risked. And the causation route is made difficult (though sometimes courts traverse it anyway, see *Comm. v. Atencio*, *supra*; but compare *Comm. v. Root*, *supra*) because of the intervening and wholly volitional acts of the deceased. As Hart and Honore have observed (*Causation in the Law* 292 (1959)); "Because the common law has never developed the notion of criminal negligence to the extent that continental codes have done, the risk theory, by which an actor is held responsible for occasioning harm by giving others the opportunity to do mischief, has not become as prominent in crime as in tort." The purpose of the clause, "whether that risk extends to natural events or the conduct of another," is precisely to remedy this defect. In all of the examples given above, as well as other similar situations, the issue of the defendant's accountability for the resultant death should turn on whether the defendant was reckless or negligent as to the risk of the deceased killing himself (or another) in the circumstances he, the defendant, helped to produce.

There is another important situation which has caused considerable difficulty but which would be properly re-

solved by the proposed draft. This is the case of the liability of a felon for the fatal acts of a co-felon or of another in the course of the felony. It is true that in the case of *People v. Washington*, 62 Cal. 2d 777, 44 Cal. Rptr. 442 (1965), the Supreme Court finally deprived the felony-murder rule of independent accessorial significance. And in the proposed draft that doctrine is sharply confined even in its original sense as a doctrine of transferred *mens rea*. But this furnishes all the more reason properly to relate the defendant's participation in the felony to a death subsequently caused during its perpetration by the victim of the felony, a bystander, a policeman, or by a co-felon. In virtually all these situations the *mens rea* does not rise above recklessness (though perhaps recklessness "manifesting disregard for the value of human life") and whether the defendant felon is to be held for having caused the death should be made to turn upon whether the death in the way it occurred was within the disregarded or overlooked risk of the conduct the defendant chose to engage in, without regard to whose hand directly produced the death. The Supreme Court in the *Washington* case observed: "It is not enough that the killing was a risk reasonably to be foreseen and that the robber might therefore be regarded as a proximate cause of the killing." (781) This is sound enough for a charge of felony-murder. It must be qualified in the case of a homicidal offense for which recklessness or negligence is sufficient. Where a bystander or even a co-felon is killed by a policeman's bullet in defending against an armed robbery in a crowded place, for example, there should be no bar to holding the surviving felon for the death for the purpose of an offense requiring recklessness or negligence so long as it is found that the occurrence of the death in this way was one of the risks as to which the defendant was reckless or negligent in launching the armed robbery.

Paragraph (1)(c) is addressed to the situation in which the offense requires no mental state at all with respect to the result. In order to confine the doctrine of strict liability within more tolerable limits in such cases, it is proposed that before the defendant may be held for the result, it must be shown that the result was the probable consequence of his conduct.

DIVISION 5. EXEMPTIONS AND DEFENSES

Chapter 1. Lack of Culpable Mental State

Section 500. Ignorance or Mistake

(1) A person's ignorance or mistake as to a matter of fact or law is a defense if it negatives the culpable mental state required for the offense or establishes a mental state sufficient under the law to constitute a defense.

(2) A person's belief that his conduct does not constitute a crime is a defense only if it is reasonable and,

(a) if the person's mistaken belief is due to his ignorance of the existence of the law defining the crime, he exercised all the care which, in the circumstances, a law-abiding and prudent person would exercise to ascertain the law; or

(b) if the person's mistaken belief is due to his misconception of the meaning or application of the law defining the crime to his conduct,

(i) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in a statute, judicial decision, administrative order or grant of permission, or an official interpretation of the public officer or body charged by law with the responsibility for interpreting, administering or enforcing the law defining the crime; or,

[(ii) he otherwise diligently pursues all means available to ascertain the meaning and application of the crime to his conduct and honestly and in good faith concludes his conduct is not a crime in circumstances in which a law-abiding and prudent person would also so conclude.]

(3) The defendant must prove a defense arising under Subsection (2) of this section by a preponderance of the evidence.

[(3) Any defense arising under Subsection (2) of this section is an affirmative defense.]

COMMENT

Section 500. Ignorance or Mistake.

Subsection (1) makes no change in the California law. It restates in more explicit form, harmonious with our proposed culpability provisions, the tautologous proposition that where a particular culpable mental state (whether intention, knowledge, recklessness or negligence) with respect to some element is required by the definition of the offense, the offense is not made out where that mental state is not established. Insofar as a mistake, whether of fact or of law, is shown to have that effect it necessarily constitutes a defense. This is the present law under *Penal Code Section 26* ("All persons are capable of committing crimes except . . . persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent") and decisions thereunder (*People v. Hernandez*, 61 Cal. 2d 529, 39 Cal. Rptr. 361 (1964); *People v. Gory*, 28 Cal. 2d 450, 170 P.2d 433 (1946)). Where mistake has not been regarded as a defense it has been because the offense was construed as imposing strict liability—hence the absence of any culpable mental state which could be negated by the mistake. (*In re Marley*, 29 Cal. 2d 525, 175 P.2d 832 (1946) (false weights).) Where a type of statute usually imposing strict liability (delivery of liquor) used the word "unlawfully" a culpable mental state was thereby imported and the court therefore allowed the defense of mistake. (*In re Ahart*, 172 Cal. 762, 159 Pac. 160 (1916).)

The draft makes no distinction between a mistake of fact or law for purposes of Subsection (1). The effect of this provision is not to make ignorance of the criminal law a defense; that problem is dealt with in Subsection (2). It simply states, again tautologously, that where a culpable mental state as to some element of the law is required by the definition of the offense, a mistake which negates that mental state precludes a conviction. (It will be recalled that our culpability provisions state that knowledge of the law defining the offense is not an element of any offense, unless it explicitly so states.) An obvious example is larceny which, in requiring a "specific intent" to appropriate the property of another neces-

sarily renders it a defense that the actor believed the property was his by virtue of a mistake as to the law of personal property. See, *e.g.*, *Penal Code Section 511* making appropriation under a good faith but untenable claim of title a defense to embezzlement.

Subsection (2) deals with the problem of when mistake or ignorance as to the law defining the crime, the criminal law itself, constitutes a defense. Insofar as a defense is articulated in this subsection it is made applicable only to crimes, thereby excluding infractions which are subject only to civil penalty and not incarceration and which will be the primary classification for strict liability offenses. In these cases, since fault is dispensed with as a basis of liability it would seem consistent to dispense with the absence of fault deriving from mistake of the criminal law as a basis for a defense.

California, in accord with all jurisdictions in this country, starts with the traditional maxim that ignorance of the criminal law is no defense. *People v. O'Brien*, 96 Cal. 171, 176, 31 Pac. 45 (1892); *People v. Burns*, 75 Cal. 627, 17 Pac. 646 (1888). See also *Penal Code Section 7(5)* excluding knowledge of the unlawfulness of the act of omission from the definition of "knowingly." However, in California as well as elsewhere courts have made exceptions to this maxim where the circumstances made conviction unjust, as for example *People v. Ferguson*, 134 Cal. App. 41, 25 P.2d 965 (1933) where advice by a deputy corporation commissioner that defendant did not need a permit to sell certain securities was stated to be a defense to violating the Corporate Securities Act. *Cf. People v. Settles*, 29 Cal. App. 2d 781, 785, 78 P.2d 274 (1938) (advice from city police that defendant could run a lottery held no defense because city police not charged with responsibility for interpreting the lottery law). Further recognition of the injustice in holding defendant for his mistake of the criminal law where he acted in reasonable official reliance may be seen in such statutes as *Financial Code Section 5022* which exempts a defendant from liability for any act done in good faith conformity with the rules and regulations of the Savings and Loan Commissioner, even if such rules and regulations are subsequently held invalid.

Subsection (2)(b)(i) of the proposed draft articulates and generalizes the foregoing California development and hence does not really amount to an innovation. Similar provisions may be found in the Model Penal Code (*Proposed Official Draft Section 2.04*) and the new Illinois (*Illinois Revised Criminal Code Section 4-8*) and New York (*New York Revised Penal Law Section 15.20*) criminal codes. The remainder of Subsection (2), however, does expand the defense of ignorance of the criminal prohibition.

Under all of Subsection (2) mistake as to the criminal law is never a defense unless it is found to be a reasonable mistake. This requirement, general as it is, necessarily precludes the defense of mistake of law in the great majority of cases where the defendant commits an act whose immorality and criminality are patent. It is only in the new statutory crimes used for regulatory purposes that a jury is likely ever to find that a mistake as to criminal prohibition is reasonable. However, the draft proceeds on the premise that a finding of reasonableness is not enough. In this area the jury needs more guidance than that supplied by a general standard of reasonableness. Hence in the remainder of Subsection (2) attention is drawn to particular situations which are to be found, in addition to a conclusion of reasonableness, before the defense is made out.

Subsection (2)(a) is addressed to the situation where the defendant (again reasonably) failed to know of the existence of the criminal prohibition. Where this is so and the jury finds on the preponderance of the evidence adduced by the defendant that he took all the care to ascertain the law which a law-abiding and prudent person would take, the case for exculpation seems to us persuasive. This provision states in general form the essence of the more particular provisions found in *Section 2.04(2)(a) of the Model Penal Code* and *Section 4-8(b)(1) of the Illinois Code* to the effect that mistake is a defense where the criminal prohibition was not published or otherwise reasonably made available. Certainly in such cases the language we propose would exculpate. But we think exculpation should be made out in all cases where a law-abiding and prudent person would not have learned of the law's existence. One such case is *Lambert*

v. California, 355 U.S. 225 (1957) where the nature of the offense (visiting Los Angeles and failing to register as a previously convicted felon) itself gave such insufficient notice of the criminal duty that a conviction was found unconstitutional in the absence of circumstances showing probability of the knowledge of the offense by the defendant. Certainly there would not be many cases of this kind. Where the prohibition reaches plainly wrongful conduct, the conduct itself alerts the law-abiding and prudent person to the need for inquiry if there is any doubt. And even in the *mala prohibita* crimes the circumstances would normally suggest inquiry—engaging in such closely regulated activities as liquor selling, food merchandising, apartment renting, etc. But in the exceptional case, like *Lambert*, where this is not the case only a blind and brutal law would insist on punishment.

Subsection (2)(b) is addressed to the situation where the defendant (still reasonably), although aware of the existence of the crime, was mistaken as to its meaning or its applicability to his conduct. Subsection (i), dealing with situations of reliance on official and responsible interpretations, we have already discussed. As stated, this imports no innovation in present law. Subsection (ii), however, does, insofar as it generalizes the essential quality of the unfairness in holding defendants who are misled by official reliance; *i.e.*, they did all that could be done to learn the nature of the prohibition and in concluding that it was lawful reacted no differently than would any law-abiding and prudent person. The subsection is placed in brackets because some of the Reporters believe it may go too far for reasons that will be stated shortly. The case to be made in favor of this subsection is as follows:

The central point is that it is plainly unjust to hold a defendant criminally liable where a jury is prepared to conclude that the conditions of this subsection are met. A case which illustrates this is *Long v. State*, 44 Del. 262, 65 A.2d 489 (1949). The court reversed a conviction of bigamy because the court below excluded evidence offered by the defendant to show his reasonable belief that his Arkansas divorce legally severed his prior marriage relationship. The case may be strongly argued to be one

where the mistake is not as to the meaning or applicability of the offense (bigamy) but rather as to an element of the offense (remarrying while having a spouse) and hence one where the mistake, though of a matter of law, negated the necessary culpable mental state (negligence) with respect to that element. Be that as it may, the court dealt with the defense as though it were a defense of misconception of the law defining the offense and allowed the defense on the ground that the defendant "before engaging in the conduct made a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law, and . . . acted in good faith reliance upon the results of such effort." We agree with the Delaware court that in such circumstances the practical difficulties commonly invoked to deny the defense of mistake of law are inapposite. It cannot be said to "encourage ignorance" of the law where the defense requires a showing of diligent and exhaustive effort to comprehend the law. And difficulties of proof are not here substantial since the defendant is required to show affirmative acts of inquiry addressed to an objective standard. We also agree with the conclusion of the Delaware court that punishing in the circumstances would be "unjust and arbitrary. Most of the important reasons which support the prohibition of *ex post facto* legislation are opposed to such a holding. It is difficult to conceive what more could be reasonably expected of a 'model citizen' than that he guide his conduct by 'the law' ascertained in good faith, not merely by efforts which might seem adequate to a person in his situation, but by efforts as well designed to accomplish ascertainment as any available under our system."

In the *Long* case the steps taken by the defendant included centrally consulting a reputable Delaware lawyer, revealing to him all the relevant circumstances, and being without reason to believe his advice was ill-founded. However, under the proposed draft the defense is not available simply on the ground that an attorney advised the defendant of the noncriminality of the proposed conduct. Still such advice would normally figure in any defense made under this subdivision. But where the defendant's conduct constitutes a diligent pursuit of all means avail-

able to comprehend the law and his conclusion that his conduct is not criminal is one which he reaches honestly and in good faith, as opposed to a pretext, and that conclusion is found by the jury to be one which a law-abiding and prudent person would reach, the fact that the evidence leading to this conclusion rested in part on private legal advice should not dissolve the defense. The risk of disingenuous legal advice, which presumably is the main concern in this area, is substantially reduced by the additional requirements stated in the draft.

On the other hand some feel that this provision is subject to abuse. It opens up a new and potentially time-consuming defense in many cases. Further, the defense can be too easily fabricated out of disingenuous advice obtained from lawyers ready to lend themselves to a scheme of evasion through venality or partisanship in their client's cause. Finally, it is believed that the potential injustice is adequately guarded against by the use of the prosecutor's discretion not to prosecute in cases in which the accused acted in good faith, and his conduct was not harmful.¹

Subsection (3) places the burden on the defendant to establish a defense under this section by a preponderance of the evidence. Since the facts constituting this defense are peculiarly within the knowledge of the defendant and the defense is envisaged as being available only in the extraordinary case where unusual circumstances exist, it seemed proper in this instance to modify the ordinary burden of proof requirements. An alternative bracketed section should lighten the burden on the defendant by simply making the defense an affirmative defense. This would require the defendant to come forward with evidence, but would leave undisturbed the burden upon the prosecution to rebut the defense beyond a reasonable doubt.

There remains to be noted one problem which is not dealt with in the proposal. This arises in connection with Subsection (1) where mistake negatives a necessary element of the crime. Suppose the mistake of the defendant

¹ *Project Director's Note*: Recognition of the defense of mistake or ignorance of law as defined in the draft, if limited to non-violent offenses or to offenses not involving damage, injury or disturbances of public order may afford a solution to the problem. The cases and the statute cited in the comment are all concerned with non-violent conduct. See Hughes, CIVIL DISOBEDIENCE AND THE POLITICAL QUESTION DOCTRINE, 43 N.Y. Univ. L.Rev. 1 (1968).

does negative a necessary mental state for the crime with which he is charged, but on the facts assumed by the defendant, although erroneously, his conduct would have constituted another crime. An example would be a burglary of a dwelling where the defendant reasonably believed the structure he was burglarizing was a store and where burglary of a dwelling is a separate and more serious crime than burglary of a store. Another example is a defendant who has intercourse with a child under twelve under the reasonable belief she is thirteen where reasonable belief is a defense and where the age difference marks the difference between a lower and higher offense. The *Model Penal Code Section 2.04(2)* explicitly deals with this situation, as does the *Illinois Revised Criminal Code (Section 4-8(c))*. The New York Code opted, apparently, not to deal with the matter in the code. We agree on the ground that the code otherwise provides adequate means for handling the problem. In all of these cases the defendant, although not guilty of the offense whose *actus reus* he actually committed, is guilty of an attempt to commit the lesser offense—he has the necessary *mens rea* (indeed that is his defense to the substantive offense he is charged with) and he has done all that he deems necessary to commit the offense. Therefore, he is plainly guilty of an attempt to commit the lesser crime. If the attempt to commit the lesser crime is a lesser included offense of the greater substantive crime he may be convicted on the charge for the latter offense. If it is not, he could be charged on a subsequent information or indictment with the attempt to commit the lesser crime. Under the present law of successive prosecutions announced in *Kellett v. Superior Court*, 63 Cal. 2nd 822, 48 Cal. Rptr. 366 (1966) a later prosecution would not be barred in these circumstances, since failure of the prosecutor to unite the two offenses in the original charge would be due to no fault of his own. If, under the successive prosecution provision we propose a second prosecution would be precluded it will be necessary to redirect our attention to this problem.

APPENDIX

MODEL PENAL CODE

Proposed Official Draft

Section 2.04. Ignorance or Mistake.

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

(a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or

(b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

(2) Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or

(b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

(4) The defendant must prove a defense arising under Subsection (3) of this Section by a preponderance of evidence.

NEW YORK REVISED PENAL LAW

Section 15.20. Effect of ignorance or mistake upon liability

1. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief of fact, unless:

(a) Such factual mistake negatives the culpable mental state required for the commission of an offense; or

(b) The statute defining the offense or a statute related thereto expressly provides that such factual mistake constitutes a defense or exemption; or

(c) Such factual mistake is of a kind that supports a defense of justification as defined in article thirty-five of this chapter.

2. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless such mistaken belief is founded upon an official statement of the law contained in (a) a statute or other enactment, or (b) an administrative order or grant of permission, or (c) a judicial decision of a state or federal court, or (d) an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law.

3. Notwithstanding any other provision of this chapter and notwithstanding the use of the term "knowingly" in any offense defined in this chapter in which the age of a child is an element thereof, knowledge by the defendant of the age of such child is not an element of any such offense and it is no defense to a prosecution therefor that the defendant did not know the age of the child or believed such age to be the same as or greater than that specified in the statute.

ILLINOIS REVISED CRIMINAL CODE OF 1961

Section 4-8. Ignorance or Mistake.

(a) A person's ignorance or mistake as to a matter of either fact or law, except as provided in Section 4-3(c) above, is a defense if it negatives the existence of the mental state which the statute prescribes with respect to an element of the offense.

(b) A person's reasonable belief that his conduct does not constitute an offense is a defense if:

(1) The offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him, and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him; or

(2) He acts in reliance upon a statute which later is determined to be invalid; or

(3) He acts in reliance upon an order or opinion of an Illinois Appellate or Supreme Court, or a United States Appellate Court later overruled or reversed; or

(4) He acts in reliance upon an official interpretation of the statute, regulation or order defining the offense, made by a public officer or agency legally authorized to interpret such statute.

(c) Although a person's ignorance or mistake of fact or law, or reasonable belief, described in this Section 4-8 is a defense to the offense charged, he may be convicted of an included offense of which he would be guilty if the fact or law were as he believed it to be.

(d) A defense based upon this Section 4-8 is an affirmative defense.

Chapter 2. Mental Illness.

Section 530. Mental Illness, Disease or Defect Precluding Responsibility

A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental illness, disease or defect, he lacked substantial capacity to know or understand what he was doing, or to know or understand that his conduct was wrongful, or to control his actions.

COMMENT

Section 530. Mental Illness, Disease or Defect Precluding Responsibility

This section is based upon the California version of the M'Naghten Rules as it is stated in *People v. Wolff*, 61 Cal. 2d 795, 40 Cal. Rptr. 271 (1964) and *Section 4.01 of the Model Penal Code*. In the *Wolff* case the supreme court made a conscious effort to broaden the exclusive emphasis on the cognitional element of the mind to which the M'Naghten formula is restricted. It did this by emphasizing that mere knowledge of the difference between right and wrong is not the proper standard for judging responsibility but that a capacity or ability to *understand* is also required:

“The test of sanity is this: First, did the defendant have sufficient mental capacity to know *and understand* what he was doing, and second, did he know *and understand* that it was wrong *and a violation of the rights of another?*”¹

This approach is similar to the test of capacity “to appreciate the wrongfulness of his conduct . . .” as used in the first part of *Model Penal Code Section 4.01*. Although *Wolff* actually breaks new ground in the decisional law of California, it still does not reach the volitional element of personality which modern psychiatry teaches is also susceptible to derangement because of

¹ The opinion quotes CALJIC No. 801 Rev. with approval: “Insanity, as the word is used in these instructions, means a diseased and deranged condition of mind which renders a person incapable of knowing *or understanding* the nature and quality of his act, or to distinguish right from wrong in relation to that act.”

mental illness, disease or defect. This tends to place illogical limits on psychiatric testimony.²

The words "mental illness, disease or defect" are intended to make it clear that the section is concerned solely with lack of responsibility resulting from an involuntary condition of the mind which excludes capacity to have criminal intent or control behavior. They are comparable to the terminology used in *Welfare and Institutions Code Section 6300*,³ (mental defect, disease or disorder), the *United States Manual For Courts-Martial*,⁴ (mental defect, disease or derangement) as well as the words used in the statutes or decisional law of jurisdictions which have followed the pattern of the *Model Penal Code*.⁵ The last clause of the section "or to control his actions" is directed specifically to the element of volitional capacity in accord with The American Law Institute's approach.⁶

Section 531. Mental Illness, Disease or Defect: When Evidence Admissible

Evidence that the defendant suffered from mental illness disease or defect is admissible whenever it is relevant to prove the defendant's state of mind.

COMMENT

Section 531. Mental Illness, Disease or Defect: When Evidence Admissible

This section restates existing law. Its language reflects a combination of *Model Penal Code Section 4.02* and the *Special Commissions on Insanity and Criminal Offenders* (hereinafter ICO Comms) *proposed draft Penal Code Section 20.5*. It is a codification of the rule of evidence in *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949) and *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

² "A further fatal defect of the M'Naughten Rules stems from the unrealistically tight shackles which they place upon expert psychiatric testimony. When the law limits a testifying psychiatrist to stating his opinion whether the accused is capable of knowing right from wrong, the expert is thereby compelled to test guilt or innocence by a concept which bears little relationship to reality." *United States v. Freeman*, 357 F.2d 606, 619 (1966).

³ Former *Welfare and Institutions Code Section 5500*. The term is used in the definition of "mentally disordered sex offender."

⁴ 1951, par. 120b; *United States v. Smith*, 17 CMR 314, 320, (1954).

⁵ E.g., Illinois, Maine, Massachusetts, Missouri, New York and Vermont.

⁶ In *United States v. Freeman*, *supra*, the Second Circuit Court of Appeals adopted *Model Penal Code Section 4.01* as the standard for the courts in its jurisdiction; a similar formulation has been adopted in the District Court of Columbia, *McDonald v. United States*, 114 U.S. App. D.C. 120, 312 F.2d 847, 851 (1962); the Third Circuit (Court) led the way in abandoning the traditional test in *United States v. Currens*, 290 F.2d 751 (1961).

Section 4.02 of the Model Penal Code contains a second subsection providing that mental disease or defect is admissible to mitigate punishment from death to life in capital cases. This is unnecessary in the light of the broad policy of admissibility declared by *Section 351 of the Evidence Code*.

Section 532. Mental Illness, Disease or Defect: Affirmative Defense, Requirement of Notice, Examination, Entry of Plea, Transfer from Inferior Court

(1) **Affirmative Defense.** Mental illness, disease or defect, precluding responsibility, is an affirmative defense which the defendant must prove by a preponderance of the evidence.

(2) **Admissibility of Evidence: Entry of Plea.** The defendant may not introduce evidence that he is not criminally responsible, as defined in Section 530, unless he has entered a plea of not guilty by reason of mental illness, disease or defect.

(3) **Expert Testimony: Notice.** The defendant may not, except upon good cause shown, introduce in his case in chief expert testimony regarding his state of mind pursuant to Section 531 unless he has given notice as provided in Subsection (4).

(4) **Notice of Plea: Examination.** The defendant shall plead not guilty by reason of mental illness, disease or defect, or shall give notice, in open court or in writing, that his mental condition will or may be in issue not later than ten days after his arraignment in the court where the offense is triable, or at such later time as the court for good cause may allow. Upon the giving of such notice or upon a plea of not guilty by reason of mental illness, disease or defect, the court shall order an examination to be conducted, as provided in Section 533.

(5) **Time to Plead.** Upon the filing of the reports provided in Section 533, the defendant shall plead if he has not previously done so and the court shall set a date for trial. The trial shall not be held earlier than ten days after the filing of the reports.

COMMENT

Section 532. Mental Illness, Disease or Defect: Affirmative Defense, Requirement of Notice, Examination, Entry of Plea, Transfer from Inferior Court

This section draws extensively upon the recommendation of *ICO Comms proposed Penal Code Section 1013*. It is more detailed than *Model Penal Code Section 4.05(1)* and it has been drafted to follow the California procedural pattern.

(1) **Affirmative Defense.** This subsection makes the issue of nonresponsibility because of mental illness, disease or defect an affirmative defense in conformity with the proposed tentative draft treatment of the defense of ignorance or mistake. It restates present law in placing the burden of proof by a preponderance of evidence on the defendant.

(2) **Admissibility of Evidence: Entry of Plea.** This subsection retains existing California pleading practice and achieves the result sought by *Model Penal Code Sections 4.03(2) and (3)* which require notice and a special verdict upon a finding of non-responsibility. It changes present California procedure, however, by eliminating the split trial provisions of *Penal Code Section 1026*. The development of the concept of limited responsibility which may be relied upon as a defense without notice or plea under present law has largely destroyed the usefulness of the split trial. As long as notice and plea are required, a defense based on mental disorder may be just as effectively and much more logically tried in a single proceeding. This recommendation accords with that of the Special Crime Study Commission on Criminal Law and Procedure (Final Report, p. 117, 1949) and the First Report of the ICO Comms (p. 56, 1962).

(3) **Expert Testimony: Notice.** It is the purpose of this subsection to require advance notice when the accused plans to introduce expert testimony with respect to his mental condition pursuant to a defense of limited or diminished responsibility. This subsection follows the *ICO Comms recommended Penal Code Section 1013* which is, in turn, based upon *Model Penal Code Section*

4.03(2). It closes a procedural gap in present law which permits a *Wells-Gorshen* defense without advance notice. This draft is not as narrow as the Model Penal Code draft since it does not restrict the production of non-expert testimony. If the prosecution has endeavored to meet lay testimony by the evidence of experts, the subsection does not prohibit the defendant from rebutting with the same kind of evidence. The draft explicitly acknowledges the power of the court to exercise discretion "upon good cause shown" in the application of this procedure.

(4) **Notice of Plea: Examination.** The effect of the notice and plea requirements of the draft statute is dealt with in this subsection. The defendant is given ten days grace following his arraignment for raising the issue of mental condition and the court is required to order a psychiatric examination either upon the giving of the notice or the entry of a plea of not guilty by reason of mental condition, or both. The effect of the notice or plea is to suspend further proceedings until the completion of the examination. The notice requirement is new. It is most important where evidence may be offered under the provisions of Section 531 (*Wells-Gorshen* limited responsibility defense). Under existing law no such notice is required, thus making it possible to catch the prosecution unaware of and unprepared for a limited responsibility defense.

(5) **Time to Plead.** If the defendant has merely given notice and has not previously entered the special plea of not guilty by reason of mental illness, disease or defect, he must do so⁷ following the filing of the reports of the examination. At this point the court is authorized to set the trial date. Sections 532(4) and (5) permit the defendant to defer entry of any pleas until after the filing of the reports of the psychiatric examination required by Section 533. This gives counsel the opportunity to know all of the relevant facts by which he should be guided in the plea decision process. Present procedure makes it often impossible for defense counsel to obtain a psychiatric report (unless the defendant can pay for one from his own resources) without entering a plea of

⁷ Unless he does not wish to raise this defense.

not guilty by reason of insanity. Results of the examination thereafter made may demonstrate that the plea must be withdrawn. The draft will make this plea-entry, plea-withdrawal process unnecessary.

**Section 533. Psychiatric Examination and Report:
Appointment of Psychiatrists**

(1) **Appointment of Psychiatrists.** Whenever a plea of not guilty by reason of mental illness, disease or defect is entered or a notice is given under Section 532(4) of this code, the court shall appoint two, and may appoint three, psychiatrists to examine the defendant and to report upon his mental condition. [All psychiatrists appointed under the provisions of this section must have training and experience substantially equivalent to that required by the American Board of Psychiatry and Neurology on the effective date of this statute.] The order of the court appointing psychiatrists pursuant to this section shall contain or have attached thereto a copy of this section.

(2) **Other Experts: Appointment.** Whenever, in the opinion of the court, any other expert evidence concerning the defendant's mental condition is, or will be required by the court or either party, the court shall appoint one or more such experts to examine the defendant and to report upon his mental condition as the court may direct.

(3) **Experts Retained by Parties.** In addition to the expert witnesses appointed by the court, either party in a criminal action may retain other psychiatrists or other experts to examine the defendant and to report upon his mental condition. Experts retained pursuant to this section shall be permitted to have reasonable access to the defendant for the purposes of examination and the giving of testimony.

(4) **Expert Witnesses: Fees.** The psychiatrists and other experts appointed by the court and those called by the district attorney shall be allowed, in addition to their actual traveling expenses, such fees as in the discretion of the court seem reasonable. The fees allowed shall be paid by the county in which the accusatory pleading against the defendant was filed.

(5) **Commitment to Institution for Examination.** On recommendation of the psychiatrists appointed by the

court, the court may order the defendant committed to a state institution or any other suitable facility for observation and examination as it may designate for a period not to exceed thirty days, unless the court, for good cause, orders a longer period of commitment not to exceed sixty days. Any defendant so committed may be given such care and treatment as is determined to be necessary by the psychiatric staff of such institution or facility. A full report of any such care and treatment shall be included in the report required under Subsection (7).

The superintendent or other person in charge of such institution or facility shall permit those psychiatrists or other experts appointed under this section to have reasonable access to the defendant.

(6) **Medical History: Communications.** Copies of any reports, records, documents or information furnished by either party to the psychiatrists appointed pursuant to this section shall be given to the other party in the action. Any psychiatrist appointed pursuant to this section, or retained by either party, shall have the right to inspect and make copies of reports and records relating to the defendant in any facility or institution in which they are located. Compliance with this section may be required by an appropriate order of the court.

(7) **Psychiatric Report: Contents.** Each psychiatrist appointed by the court who examines the defendant pursuant to this section shall file a written report with the clerk of the court who shall deliver copies to each party. The report of the examination shall include, but need not be limited to, the following:

- (a) A description of the nature of the examination;
- (b) The number of examinations and duration of each examination;
- (c) The sources of information about the defendant;
- (d) A diagnosis or description of the defendant's mental condition;
- (e) An opinion as to the defendant's competency to be proceeded against, together with the reasons and basis for the opinion;
- (f) If the defendant has been convicted, an opinion as to his competency to be sentenced, together with the reasons and basis for the opinion;

(g) If prior to conviction, an opinion as to whether or not the defendant was suffering from any mental illness, disease or defect at the time of the conduct alleged to have constituted the offense charged against the defendant and whether, as a result thereof, he lacked substantial capacity to know or understand what he was doing; or to know or understand that his conduct was wrongful or to control his actions; or the extent to which, as a consequence of mental illness, disease or defect, the defendant did or did not have a state of mind or the capacity to have a state of mind relevant to any issue in the trial of the action;

(h) A report of the care and treatment received by defendant prior to the examination.

(8) Appointed Psychiatrists: Examination and Cross-Examination. Upon the trial, the psychiatrists appointed by the court may be called as witnesses by either party to the action or by the court and when so called, shall be subject to all legal objections as to competency and bias and as to qualification as an expert witness. When called by the court or by either party to the action, the court may examine the psychiatrist, but either party shall have the same right to object to questions asked by the court and the evidence adduced as though the psychiatrist or witness were called by an adverse party. When the psychiatrist is called and examined by the court, the parties may cross-examine him in the order directed by the court. When called by either party to the action, any adverse party may examine him the same as in the case of any other witness.

(9) Psychiatric Experts: Scope of Testimony. When any psychiatrist or other expert who has examined the defendant, whether or not appointed under this section, testifies concerning the defendant's mental condition, he shall be permitted to make a statement as to (a) the nature of his examination, (b) his diagnosis of the mental condition of the defendant at the time of the commission of the offense charged, (c) an opinion, if relevant, of the extent to which, the defendant, as a result of mental illness, disease or defect, was incapable of knowing or understanding what he was doing, or that he did not know and understand that his conduct was wrongful, or of the

extent to which his capacity to control his actions was substantially impaired, (d) an opinion, if relevant, that the defendant did or did not have the state of mind or capacity to have the state of mind which is in issue during the trial, or (e) an opinion, if relevant, of the defendant's competency to be proceeded against or to be sentenced. The psychiatrist shall be permitted to make an explanation reasonably serving to clarify his diagnosis and opinion.

COMMENT

Section 533. Psychiatric Examination and Report: Appointment of Psychiatrists

This section is drawn from *Model Penal Code Section 4.05*, *ICO Comms proposed Penal Code Section 1014* and existing *Penal Code Sections 1026 and 1027*. Procedurally it is not substantially different from current practice but it increases the scope of the court's discretion in the determination of the issue at the defendant's condition and is much more specific with respect to the content of the report of the court-appointed psychiatrists.

(1) **Appointment of Psychiatrists.** This makes no change in the present law. The minimum qualifications for the appointed experts, as stated in the bracketed sentence, were included in the ICO Comms recommendation upon the advice of the psychiatrist members of the commissions. It is bracketed here pending discussion with qualified advisers.

The requirement that the order of appointment carry with it a copy of Section 533 is to make sure that appointed experts are aware of the scope and content of the examination required. There have been instances in which court-appointed experts have not clearly understood the issues to which their examinations were relevant; this provision is designed to eliminate misunderstanding.

(2) **Other Experts: Appointment.** This subsection is new. In some circumstances the examining psychiatrists require the aid of psychologists and neurological specialists to supplement their own inquiries. This subsection recognizes this need.

(3) **Experts Retained by Parties.** This part of the draft makes it clear that nothing in the statute precludes the party from securing the services of their own experts.

(4) **Expert Witnesses: Fees.** The fee provision with respect to experts appointed by the court and called by the prosecution is taken from existing *Penal Code Section 1027*.

(5) **Commitment to Institution for Examination.** In some cases hospitalization in order to permit observation and treatment over a period of time is a desirable adjunct of a psychiatric examination. This subsection gives the court discretion for ordering commitment to an appropriate institution in order to facilitate the examination when this may be desirable. It makes a resource available to the court which may be helpful in discouraging "quickie" examinations. The final paragraph insures that commitment for examination will not isolate the defendant from the experts charged with reporting on his condition.

(6) **Medical History: Communications.** The presentation of all relevant information to the experts is important. This subsection is designed to facilitate communication of information and to insure access to hospital records and records of custodial institutions which may be required by the examining physicians.

(7) **Psychiatric Report: Contents.** This is one of the most important parts of the proposed section. *Penal Code Section 1027* as it now stands directs the court-appointed experts "... to examine the defendant and investigate his sanity, and to testify, whenever summoned . . ." There is no requirement for the filing of a formal report but written statements of the conclusions of the experts are ordinarily furnished to the appointing judge as a matter of routine practice. Sometimes these are reasonably comprehensive but more often they are little more than brief expressions of the psychiatrists' opinions. In those cases which are submitted to the court for decision on the basis of the court-appointed experts' reports, evidence of this character is an inadequate foundation for judgment. It is frequently supplemented, of course, by oral testimony but procedures are not uniform from county to county.

Not only is present practice deficient because of the paucity of information which it requires, but it provides almost no guidance for the expert concerning the nature of the examination he is expected to make or the relevance

of his findings to the issues before the court. The desirability of an explicit and informative report is obvious.

Paragraphs (e) and (g) are of particular importance. They require the expert's report to include a finding on the defendant's fitness to be proceeded against whether the investigation is made before conviction, or after conviction and before sentence. This is designed to insure the making of a complete examination at the earliest possible time so that all relevant information about the defendant's mental condition will be available for the guidance of court and counsel.

Under present practice, an expert may report that the defendant's mental condition at the time of the commission of the offense charged was that of a reasonable person (sane) without at the same time indicating that his present mental state renders him unfit to be proceeded against.

The requirements of this section are designed to guide the court-appointed expert, to require a complete examination with respect to the defendant's mental condition and capacity, and to secure the disclosure of all relevant psychiatric information.

(8) Appointed Psychiatrists: Examination and Cross-Examination. This subsection restates the provisions of *Penal Code Section 1027*. It conforms substantially to *Model Penal Code Section 4.07(3)* except that it does not carry the Model Penal Code limitation of the use of hypothetical questions. Expert testimony based on hypothetical questions is of such little weight that it is rarely used but there may be some situation in which a defendant may be deprived of any expert defense if the Model Penal Code limitation is adopted.

(9) Psychiatric Experts: Scope of Testimony. This subsection does not change existing rules of evidence relating to the scope of expert testimony and it conforms to the provisions of the California Evidence Code. It accords also with the provisions of *Model Penal Code Section 4.07(4)*.

In staff discussion it was contended that expert witnesses called to testify with respect to the mental condition of the defendant should be prohibited from expressing any opinion as to the ultimate issue. This would be a departure from California decisional law and *Evidence Code Section 805*.

Some early California decisions support the ultimate issue limitation on the testimony of experts but this view has been repudiated. The California Supreme Court in *People v. Wilson*, 25 Cal. 2d 341, 153 P.2d 720 (1944), conceded that there is no hard and fast rule concerning the response of an expert to a question which coincides with the ultimate issue. It pointed out, however, that there are cases in which there is no other practicable way to question the expert. As examples of such cases, the court points to those in which expert testimony is offered with respect to value or sanity. McCormick is of the same view. He is not only critical of the limitation rule but states that *all* courts which profess or have professed adherence to the rule forbidding examination as to the ultimate question disregard it when value, sanity, handwriting and identity are in issue.⁸

More important than case and text discussion may suggest, however, is the actuality of trial practice. If the expert witness cannot express his opinion on the ultimate issue of mental condition a defendant who offers psychiatric proof of non-responsibility (or limited responsibility) is robbed of any effective defense.

No matter where procedural rules place the burden of proof, the insanity defense is utterly dependent upon the strength of the defendant's showing. The very raising of the issue amounts to a concession that the crime has been committed; under present California practice the defense is normally raised before the very jury which found the defendant guilty. In these circumstances, the defendant needs all the help he can get and if there is an expert available to him who will express an opinion that he is insane or not responsible because of mental illness, he ought to be able to offer that testimony in just those terms. To do otherwise is to keep from the ears of the jury the help of the expert on the very issue on which it is most incapable of making an intelligent determination. (See 15 *University of Chicago Law Rev.* 107, 162 (1947).)

On the other hand, restricting the expert's testimony as to the ultimate issue would have little impact one way or the other on the prosecution's case. Under existing split trial procedure, it would have none. If the issue is tried, for example, under the restrictive rule, the prosecution

⁸ McCormick, *Evidence*, p. 26 (1954).

expert will either testify that the defendant had no mental illness or defect, or that if he did, it was not significant. The impact of this testimony points to but one conclusion: sanity. To forbid an express statement of opinion on this ultimate issue, detracts not one whit from the force of the evidence. Any endeavor to counter it by anything short of the firm opinion of an expert that the defendant is insane or not responsible would be ineffective. The expert's opinion is the only realistic way in which the defendant may carry his burden of proof (*Evidence Code Section 522*).

Section 534. Verdict on Acquittal: Defense of Impaired Capacity

In any case in which evidence of mental illness, disease or defect has been introduced pursuant to the provisions of Section 531 and in which the defendant is acquitted, the court may order an evaluation of his condition and initiation of proceedings pursuant to the provisions of Division 5, Part I, Chapter 2, Article 2 of the Welfare and Institutions Code commencing with Section 5200 (California Mental Health Act of 1967).

COMMENT

Section 534. Verdict on Acquittal: Defense of Impaired Capacity

The decisions of the California Supreme Court in *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949) and *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959), introduced the defense of diminished or impaired capacity. The effect of these cases is to permit evidence to be received as a "partial defense" for the purpose of negating the specific mental state essential to a particular crime. The inquiry to be made is whether the crime which the defendant is accused of having committed has in point of fact been committed. For this purpose whatever will fairly and legitimately lead to the discovery of his mental condition and status at the time, may be given in evidence to the jury, and may be considered by them in determining whether the defendant was in fact guilty of the crime charged against him.⁹ Ordinarily the purpose of this defense

⁹ *People v. Wells*, 33 Cal.2d 330, 346, 202 P.2d 53 (1949).

is to permit the defendant to show that because of some impairment of his mind he is not guilty of the offense charged but of a lesser degree of the offense. For example, the crime of assault with intent to kill may be shown not to have been committed if the evidence indicates that the defendant lacked the specific intent to kill because of some mental impairment; in such a case, he should be convicted of the lesser offense of assault with a deadly weapon.

It is not only conceivable, however, but highly probable that evidence pertinent to this defense might in some cases seem so persuasive to a jury that instead of returning a verdict of some lesser degree of the offense charged, they might return a verdict of acquittal. In short, they might believe that the defendant's mental impairment made it impossible for him to entertain any culpable mental state. This might very well result in the immediate release of an individual by a verdict of acquittal in a situation in which the evidence of his mental condition points strongly to the conclusion that he is dangerous and that unconditional release might threaten the public safety.

Section 534 has been drafted to permit the court, in the event of an acquittal in such cases, to take the same action as might be taken in connection with an application for the civil commitment of a mentally disordered person. Thus, it authorizes the court, in its discretion, to initiate the procedure provided in the California Mental Health Act of 1967 for the examination, evaluation and possible custodial care that the nature of the defendant's condition indicates may be necessary.

Section 535. Verdict on Acquittal: Plea of Not Guilty by Reason of Mental Illness, Disease or Defect

Whenever a plea of not guilty by reason of mental illness, disease or defect is entered and the defendant is acquitted on that plea, the verdict or, if trial by jury has been waived, the finding of the court and the judgment must so state.

COMMENT

Section 535. Verdict on Acquittal: Plea of Not Guilty by Reason of Mental Illness, Disease or Defect

For procedural purposes, this section provides that an acquittal by reason of mental illness, disease or defect must be expressed in a responsive verdict and judgment.

Section 536. Acquittal by Reason of Mental Illness, Disease or Defect: Release or Commitment: Petition for Discharge

After entry of judgment of not guilty by reason of mental illness, disease or defect, the court shall, on the basis of the evidence given at the trial or at a separate hearing, make an order as follows:

(1) **Release: Defendant Recovered or Not Dangerous.** If the court finds that the person is no longer affected by mental illness, disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person [or property] of others and is not in need of care, supervision or treatment, the court shall order him discharged from custody.

(2) **Release on Supervision.** If the court finds that the person is affected by mental illness, disease or defect and that he presents a substantial danger to himself or the person [or property] of others, but he can be controlled adequately and given proper care, supervision and treatment if he is released on supervision, the court shall order him released subject to such supervisory orders of the court, including supervision by the county probation department, as are appropriate in the interests of justice and the welfare of the defendant. Conditions of release in such orders may be modified from time to time and supervision may be terminated by order of the court as provided in Subsection (1) or (5).

(a) **Termination of Supervision and Commitment to the Director of Mental Hygiene.** At any time within five years of the original entry of the order of release on supervision made pursuant to this subsection, the court may, upon notice to the prosecution and such person, conduct a hearing to determine if the person is affected by mental illness, disease or defect. If the court determines that the person is

affected by mental illness, disease or defect, the court may release him on further supervision, as provided in Subsection (2), but for not longer than five years from the original entry of the order of release on supervision. If the court determines that the person is affected by mental illness, disease or defect and presents a substantial danger to himself or to the person [or property] of others and cannot adequately be controlled if released on supervision, it may at that time make an order committing the person to the Director of Mental Hygiene for custody, care and treatment.

(b) **Supervisory Release: Petition for Modification or Discharge.** Any person subject to the provisions of this subsection may apply to the superior court of the county in which he is confined, or of the county from which he is committed, for a hearing upon his petition for discharge from or modification of an order upon which he was released upon the supervision of the court and the county probation officer on the ground that he has recovered from his mental illness, disease or defect or, if affected by mental illness, disease or defect, no longer presents a substantial danger to himself or the person [or property] of others and no longer requires supervision, care or treatment; the hearing on an application for such discharge or modification shall be held on notice to the district attorney and the probation officer of the county in which the application is filed.

(3) **Commitment to the Director of Mental Hygiene.** If the court finds that the person presents a substantial risk of danger to himself or the person [or property] of others and that he is not a proper subject for release on supervision, the court shall order him committed to the Director of Mental Hygiene for custody, care and treatment.

(a) **Committed Person: Procedure for Release: Application by Director of Mental Hygiene.** If, after at least ninety days from the commitment of any person to the custody of the Director of Mental Hygiene, the director is of the opinion that the person is no longer affected by mental illness, disease or defect, or, if so affected, that he no longer presents a sub-

stantial danger to himself or the person [or property] of others, the director may apply to the court which committed the person, or to the superior court of the county in which he is confined, for an order of discharge. The application shall be accompanied by a report setting forth the facts supporting the opinion of the director. Copies of the application and the report shall be transmitted by the clerk of the court to the district attorney of the county.

(b) **Committed Person: Procedure for Release: Petition by the Person.** Any person who has been committed to the Director of Mental Hygiene for custody, care and treatment, after the expiration of ninety days from the date of the order of commitment, may apply to the superior court of the county in which he is confined or of the county from which he was committed for an order of discharge upon the grounds that he is no longer affected by mental illness, disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person [or property] of others. Copies of the application and the report shall be transmitted by the clerk of the court to the district attorney of the county.

(4) **Hearing on Petition for Release, Modification of Conditions of Release, or Discharge.** The court shall conduct a hearing upon any application for release or modification filed pursuant to this section. If the court finds that the person is no longer suffering from mental illness, disease or defect, or, if so affected, that he no longer presents a substantial danger to himself or the person [or property] of others, the court shall order him discharged from custody or from supervision. If the court finds that the person would not be a substantial danger to himself or to the person [or property] of others, and can be controlled adequately if he is released on supervision, the court shall order him released as provided in Subsection (2). If the court finds that the person has not recovered from his mental illness, disease or defect and cannot adequately be controlled if he is released on supervision, the court shall order him remanded for care and treatment.

In any hearing under this subsection, the court may appoint one or more psychiatrists qualified under Section

533 to examine the person and to submit reports to the court. Reports filed with the court pursuant to such appointment shall include, but need not be limited to, an opinion as to the mental condition of the person and whether the person presents a substantial danger to himself or the person [or property] of others. To facilitate the psychiatrist's examination of the person, the court may order him placed in the temporary custody of any state institution or other suitable facility.

(5) **Release from Custody or Supervision: Maximum Period.** Any person who, pursuant to this section, has been in the custody of the Director of Mental Hygiene or on release on supervision by the court for a period in excess of five years shall, in any event, be discharged if he does not present a substantial danger to the person of others.

COMMENT

Section 536. Acquittal by Reason of Mental Illness, Disease or Defect: Release or Commitment: Petition for Discharge

(1) **Release: Defendant Recovered or Not Dangerous.** This section authorizes the release of a mentally ill offender when it appears that the person acquitted because of his mental condition is no longer mentally affected or in need of custodial treatment. A separate hearing on this issue is not mandatory as under present law. Often the matter of the defendant's mental condition is plainly apparent from the testimony given at the trial; in such cases, an additional hearing on the same issue seems unnecessary. An order for discharge may not be made if the defendant is not free from mental illness unless the court is of the opinion that the defendant is not dangerous to himself or the person or property of others and is not in need of care, supervision or treatment. If the evidence indicates that the defendant requires and is a fit subject for community psychiatric services, the court shall have the authority to impose supervisory or custodial restraints as provided in the subsections which follow.

(2) **Release on Supervision.** Present law offers the court two alternatives when a defendant has been found

not guilty by reason of insanity: release or commitment to a state hospital. In actual practice, commitment is the usual procedure; for understandable reasons, summary release is rarely granted. The lack of any alternative disposition through the use of local institutions, facilities and resources for the care and treatment of the mentally ill is attributable to the fact that until about ten years ago, local means for the care of mentally ill persons was, for all practical purposes, non-existent. This is no longer true. The creation, development and expansion of local community psychiatric services has reached such a high level that the former necessity for reliance upon state institutional and treatment facilities has been greatly lessened. In point of fact, the current trend is toward the eventual elimination of the large state hospital for the mentally ill in favor of the build-up of local resources for custody, care and treatment. The draft subsection provides that administration of the release program and the supervision of persons released pursuant to its provisions may be performed by the probation department. Orders of release and the conditions of release remain within the continuing jurisdiction of the court for modification or termination.

(a) **Termination of Supervision and Commitment to the Director of Mental Hygiene.** This subsection together with Subsection (5) establishes a provisional maximum period of release subject to supervision of five years. It authorizes commitment of a person so released to the Director of Mental Hygiene at any time during the five year period that the person's mental condition has regressed to the point where he is dangerous to himself or to the person or property of others.

(b) **Supervisory Release: Petition for Modification or Discharge.** Procedure is provided by this subsection through which the person released on supervision may initiate action for his release upon a showing that he has recovered and is a fit subject for discharge or modification of the conditions of his release.

(3) **Commitment to the Director of Mental Hygiene.** This subsection authorizes commitment to the Director

of Mental Hygiene of those persons acquitted by reason of mental illness, disease or defect whose potential dangerousness indicates that release or release under supervision involves risk that the individual may be dangerous to himself or the person or property of others.

(a) **Committed Person: Procedure for Release: Application by Director of Mental Hygiene.** The Director of Mental Hygiene, by the provisions of this subsection, may initiate proceedings for the release of a committed person, after the expiration of ninety days if such release is consistent with the welfare of the individual and the public safety. The criteria for release change present law which authorizes discharge upon a finding that the person has "recovered his sanity." Under existing administrative procedures in the Department of Mental Hygiene, this standard is interpreted to require the commencement of discharge proceedings for a "recovered" person without regard for the probability of his regression to a condition of dangerousness.

(b) **Committed Person: Procedure for Release: Petition by the Person.** This is a companion subsection to Section (2)(b). It provides a means for the initiation of release proceedings by the committed person and is in accord with the provisions of *Penal Code Section 1026a* except that its succeeding subsections permit the alternative of release under supervision in the local community rather than only discharge or recommitment.

(4) **Hearing on Petition for Release, Modification of Conditions of Release, or Discharge.** This is a general procedural subsection which describes the form of the proceedings to be followed in any action for the release or discharge of a person subject to an order of supervisory release or commitment. It restates the flexible powers of the court to make appropriate disposition of the persons subject to its orders and provides for the appointment of psychiatric experts should their assistance be needed.

(5) **Release from Custody or Supervision: Maximum Period.** This subsection establishes a maximum period

of five years for supervised release or commitment to the Director of Mental Hygiene and requires discharge at the end of that term unless the mentally disordered offender is found to be dangerous to others. The draft excludes danger to self or to property. It follows the ICO Comms in limiting indefinite commitment to those found to be seriously assaultive or homicidal. (It should be remembered that under the provisions of Section 536(2)(a), a person under supervisory release may be committed to the Director of Mental Hygiene on the last day of his maximum release period and held in custody for an additional five years. This could result in a ten-year maximum period before the provisions of Subsection (5) could be invoked.)

Indeterminate commitment occurs under present law in those cases where the Director of Mental Hygiene, or the court, or both are of the opinion that the committed person has not been "restored to sanity." It is the purpose of the draft to limit such commitments only to those cases where release will give rise to problems of public safety. The choices to be made here tend to be arbitrary but the problem does not lend itself easily to solutions that will command ready acceptance. The draft attempts to minimize whatever arbitrary factors it includes by keeping the door open to continuing judicial review.

Section 537. Mental Illness, Disease or Defect: Competency to be Proceeded Against or Sentenced

A person can neither be proceeded against nor sentenced after conviction while he is incompetent as defined in this section:

(1) A defendant is incompetent to be proceeded against in a criminal action if, as a result of mental illness, disease or defect, he is unable (a) to understand the nature of the proceedings, (b) to assist and cooperate with his counsel, (c) to follow the evidence, or (d) to participate in his defense.

(2) A defendant is incompetent to be sentenced if, as a result of mental illness, disease or defect, he is unable (a) to understand the nature of the proceedings, (b) to understand the charge of which he has been convicted, (c) to understand the nature and extent of the sentence

imposed upon him, or (d) to assist and cooperate with his counsel.

COMMENT

Section 537. Mental Illness, Disease or Defect: Competency to be Proceeded Against or Sentenced

The tests for competency in this section are made applicable to all proceedings in order to embrace preliminary examinations and other pre-trial matters as well as the trial itself. The criteria for determining competency are more particularized than the corresponding *Model Penal Code Section 4.04* and follow the model of *ICO Comms proposed amendment to Penal Code Section 1367*. (First Report, p. 56.) Such particularization may be legally unnecessary but the commissions felt that precision in definition here would be helpful in obtaining precision in expert testimony at the hearing on the issue. The tests accord with existing law.

Section 538. Mental Illness, Disease or Defect: Hearing on Competency to be Proceeded Against or Sentenced

(1) **Motion for Hearing: Suspension of Proceeding: Before Trial.** At any time before the commencement of the trial either party may make a motion for a hearing on the defendant's competency to be proceeded against, or the court on its own motion may order such a hearing. Thereupon, the court shall suspend all proceedings in the criminal prosecution and proceed as provided in Section 533 of this code.

(2) **Motion for Hearing: Suspension of Proceedings: During Trial or Before Sentence.** At any time after the commencement of the trial, but before sentence, if it appears on the motion of either party or the court's own motion that there is reasonable cause to believe the defendant is incompetent to be proceeded against or sentenced, the court shall suspend all proceedings in the criminal prosecution and proceed as provided in Section 533 of this code.

(3) **Second or Subsequent Notice, Plea or Motion: Suspension of Proceedings Discretionary.** If the court for any reason once proceeds under Section 533 of this code, then upon a second or subsequent notice or plea under

Section 532 of this code, or upon a second or subsequent motion under this section, the court does not have to suspend the proceedings in the criminal prosecution and again proceed as provided in Section 533, except upon a showing of good cause or changed conditions.

(4) **Transfer from Inferior Court.** If the offense is pending in a municipal or justice court, the court shall transfer the case immediately to the superior court of the county when notice is given as provided in Section 532 or upon a plea of not guilty by reason of mental illness, disease or defect or issue of competency to be tried. All subsequent proceedings, including the order for examination under Section 533, shall be in the court to which transfer is made.

COMMENT

Section 538. Mental Illness, Disease or Defect: Hearing on Competency to be Proceeded Against or Sentenced

This section is substantially the same as the *ICO Comms proposed Penal Code Section 1364* which is, in turn, a restatement of the provisions of existing *Penal Code Section 1368*. It adds procedural detail lacking in the present law and provides a much more explicit means by which the issue may be raised.

(1) **Motion for Hearing: Suspension of Proceeding: Before Trial.** Under the existing statute, the issue of competency to be proceeded against must be determined only when "a doubt arises as to the sanity of the defendant." (*Penal Code Section 1368*.) By decisional law, this "doubt" must arise in the mind of the judge. The opinions of counsel or any other persons are irrelevant. [*People v. Borroughs*, 197 Cal. App. 2d 229, *sub. nom. People v. Flemming*, 17 Cal. Rptr. 323 (1961).] The absence of procedural guidelines invites uncertainty and confusion which the draft seeks to eliminate in this subsection by making the issue determinable upon motion of the parties or of the court. (Illustrative of the need for formal procedures at this point is *People v. Westbrook*, 62 Cal. 2d 197, 41 Cal. Rptr. 809 (1964).) Subsection (1) applies to the period before the commencement of trial.

(2) **Motion for Hearing: Suspension of Proceeding: During Trial or Before Sentence.** This is a counterpart of the preceding subsection applicable after the commencement of trial.

(3) **Second or Subsequent Notice, Plea or Motion: Suspension of Proceedings Discretionary.** This proviso is intended to give the court discretionary power to prevent repetitive and unmeritorious attempts to raise the issue of competency to be proceeded against in situations where a Section 533 examination of the defendant has previously been made. Any examination under that section will have included a report on this issue; absent a showing of good cause or changed conditions, the judge should have the discretion to deny any subsequent request for an additional Section 533 examination.

(4) **Transfer from Inferior Court.** This subsection prescribes the procedure to be followed when a notice is given or where a plea of not guilty by reason of mental condition is entered in an inferior court. It corresponds to *Penal Code Section 1429.5* but differs by transferring jurisdiction of all the issues to the superior court. Present procedural requirements for a trial on the issue of guilt alone in the inferior court are unwieldly and unnecessary if, as the draft provides, the split trial is abandoned.

Section 539. Determination of Competency: Proceedings and Trial: Commitment for Incompetence: Certification of Restoration: Dismissal of Charge: Credit on Sentence

(1) **Report of Incompetency by Psychiatrist: Trial Required.** If at least one psychiatrist concludes in his report filed pursuant to Section 533 of this code that the defendant may be incompetent to be proceeded against or to be sentenced, the court must order the issue of his competency to be determined within ten days after the filing of the reports pursuant to Section 533, unless the court, for good cause, orders the issue tried at a later date.

(2) **Competency to Proceed: Trial: By Court or Jury.** Any hearing under this section shall be by the court without a jury [or by a jury if one is demanded by either party].

(3) **Suspension of Criminal Proceedings: Trial on Issue of Competency.** Whenever the court orders the issue of the defendant's competency to be determined, the court must immediately suspend all further proceedings in the criminal prosecution until such determination. The trial jury in the criminal prosecution may be discharged or retained at the discretion of the court until such determination. The dismissal of the trial jury shall not be a bar to further prosecution. The issue under the defendant's plea of not guilty and the issue of his competency to be tried or to be sentenced shall not be heard by the same jury, unless the court, with the consent of both parties, so orders.

(4) **Finding of Competency to be Proceeded Against: Resumption of Trial or Sentencing.** If the court finds that the defendant is competent to be proceeded against or to be sentenced, the proceedings must be resumed, or judgment be pronounced within the time limits provided by law.

(5) **Finding of Incompetency: Commitment.** If the court finds that the defendant is incompetent to be proceeded against or sentenced, the court shall order him committed to the Director of Mental Hygiene for custody, care and treatment for so long as such incompetency endures but subject to the provisions of Subsection (7). A finding of incompetency to be proceeded against or to be sentenced and a commitment to the Director of Mental Hygiene made pursuant to this subsection does not preclude the trial of any issues of law which are capable of fair determination prior to trial and without the personal participation of the defendant.

(6) **Competency Restored: Certification of the Director of Mental Hygiene: Hearing: Medical Records.** Whenever, in the opinion of the Director of Mental Hygiene or any officer designated in writing by him, the defendant regains his competency, the director or such officer must, in writing, certify that fact to the clerk of the court in which the proceedings are pending. Such certification, unless contested by the defendant or the people, shall be sufficient to authorize the court to find the defendant competent and to order the criminal prosecution to continue. If the certification is contested, a hearing shall be held

as provided in Section 540 and the party so contesting shall have the burden of proving by a preponderance of the evidence that the defendant remains incompetent.

Upon written request by the court or either party, filed with the clerk of the court and served upon the superintendent of the institution in which the defendant is or was confined, the superintendent shall file with the clerk of the court the defendant's complete medical records, or such portion thereof as is designated in the request, or a certified copy thereof, while at said institution.

(7) **Dismissal of Charges after Finding of Incompetency: Civil Commitment.** After a finding of incompetency, the court may, in the interest of justice or upon a finding that [so much time] five years have elapsed since the commitment that further prosecution would be unjust or impractical, upon motion of either party, and after reasonable notice to the other party and an opportunity to be heard, dismiss the pending indictment, information, or other criminal charges. If the criminal charges are so dismissed while the defendant is incompetent, the commitment shall remain in effect with the same force and effect as if the defendant were committed to the Department of Mental Hygiene as a mentally disordered person pursuant to the provisions of Section 5304 of the Welfare and Institutions Code (California Mental Health Act of 1967.)

(8) **Finding or Certificate of Competence: Inadmissibility.** A finding or certificate that the defendant is mentally competent shall in no way prejudice the defendant in his defense on the plea under Section 532 or in his defense under Section 531 of this code. Such finding or certificate shall not be introduced in evidence on such issues or otherwise brought to the notice of the jury.

(9) **Proceedings Civil in Nature.** The proceedings under this section shall be part of the criminal proceedings except that they shall be conducted pursuant to the rules for the trial of civil actions.

(10) **Credit on Sentence for Time under Commitment.** Any period for which the defendant is committed pursuant to this section shall be credited against any sentence which may later be imposed on him for the offense or offenses with which he is charged.

COMMENT

Section 539. Determination of Competency: Proceedings and Trial: Commitment for Incompetence: Certificate of Restoration: Dismissal of Charge: Credit on Sentence

(1) **Report of Incompetency by Psychiatrist: Trial Required.** California decisional law holds that the issue of competency may be raised as a matter of law when "doubt" of sanity appears from the record. *People v. Aparicio*, 38 Cal. 2d 565, 241 P.2d 221 (1952); *People v. Merkouris*, 46 Cal. 2d 540, 297 P.2d 999 (1956). The sufficiency of the record to establish "doubt," however, permits the judge to resolve the issue whenever the evidence is in conflict and this presents the problem that was at issue in the second *Merkouris* case. (*People v. Merkouris*, 52 Cal. 2d 672, 344 P.2d 1 (1959).) The opinion of the dissenting justices makes it clear that both the definition of "doubt" and the quantum of evidence required to establish it are tests that do not lend themselves to practical application.

The draft section resolves this problem by requiring a hearing if at least one of the examining psychiatrists is of the opinion that the accused may be incompetent to be proceeded against. This is not only a more logical basis for requiring a determination of the issue but it is one which is free from the ambiguities inherent in present procedure and practice.

As the draft is now framed, however, a unanimous report of the psychiatrists who have participated in the Section 533 examination to the effect that the defendant is not unfit to be proceeded against, forecloses the issue. *Model Penal Code Section 4.06(1)* leaves the entire issue, regardless of the content of the report of the examining psychiatrists, to the determination of the court either upon the basis of the report or an evidentiary hearing if either party contests the report. Should it be considered desirable to require a hearing as the basis for a judicial finding on competence to be proceeded against where the report finds the defendant competent without dissent, it would be a simple matter to insert a further provision to this effect: "If all the psychiatrists who file reports pursuant to Section 533 of this code find that the defendant is competent to be

proceeded against, the court shall make its finding accordingly unless the defendant makes a motion to contest the reports. If the finding is contested, the court shall hold a hearing on the issue. The reports may be received in evidence upon such a hearing and any party may cross-examine the psychiatrists who made them and offer evidence upon the issue. The court shall consider all of the evidence and make a finding that the defendant is or is not competent to be proceeded against. Thereafter, proceedings shall be resumed as provided in this section."

(2) **Competency to Proceed: Trial: By Court or Jury.** This language is taken from existing *Penal Code Section 1368*.

(3) **Suspension of Criminal Proceedings: Trial on Issue of Competency.** This is a restatement of existing practice and procedure and an amplification of the provisions of *Penal Code Section 1368* with respect to the selection of the jury to try the issue of competency to be proceeded against.

(4) **Finding of Competency to be Proceeded Against: Resumption of Trial or Sentencing.** This is taken from *Penal Code Section 1370*.

(5) **Finding of Incompetency: Commitment.** This is also taken from *Penal Code Section 1370* without change.

(6) **Competency Restored: Certification of the Director of Mental Hygiene: Hearing: Medical Records.** Except for the addition of procedural detail, this subsection is the same as *Penal Code Section 1372*. It provides for certification to the clerk of the court when the Director of Mental Hygiene is of the opinion that the defendant has regained his competency to be proceeded against. This is a more appropriate channel than the present provision for the sheriff and district attorney. It recognizes the defendant's right to contest the certification and accords the same right to the people. Reference is made to Section 540 for hearing procedures upon such a contest; the parties are given access to the medical records of the defendant in the possession of the institution in which he was confined.

(7) **Dismissal of Charges after Finding of Incompetency: Civil Commitment.** Some defendants who are committed to the Department of Mental Hygiene because of incompetency to be proceeded against require such long term custodial care and treatment that resumption of the criminal proceedings is, as a practical matter, impossible. In such circumstances, there should be some means available to terminate the criminal proceedings without freeing the defendant from the custodial care and treatment which his mental condition may still require. This subsection provides procedures which are substantially the same as those which now appear in *Penal Code Section 1370*. The draft is drawn from *Model Penal Code Section 4.06* and *ICO Comms proposed Penal Code Section 1365(g)*.

(8) **Finding or Certificate of Competence: Inadmissibility.** The purpose of this subsection is to insure a clear separation of the issue of competency to be proceeded against from those issues which relate to the responsibility of the accused for the offenses charged.

(9) **Proceedings Civil in Nature.** Existing procedures, according to the decisional law, are neither criminal nor civil but are designated as "special proceedings." The purpose of this subsection is to make it clear that such special proceedings are nonetheless part of the criminal case in order to preserve the record of the entire case in a single file.

(10) **Credit on Sentence for Time under Commitment.** This is a recommendation of the ICO Comms which deserves full consideration. The commissioners support this proposal with the following statement:

"Paragraph (j) is designed to give the committed person sentence credit for the time he has been subject to commitment as incompetent to proceed.

"Theoretically, this is anomalous because the commitment has been made on the ground and for the period of the defendant's incompetency to proceed and not as confinement for a crime. Theoretically also, when defendant is restored to competency he should be subject to punishment as any other offender.

“But these theoretical considerations overlook the fact that in the eyes of the defendant he has been subject to involuntary custody and that to him it seems unjust that he be released only to be returned right back to custody. Moreover, in some instances defense counsel have been reluctant to raise a question as to defendant’s competency to proceed in cases involving relatively minor offenses because of the risk that the period of custody may be larger than a maximum sentence. Finally, and perhaps most importantly, if the treatment given the defendant while in custody has been effective, he may not be in as much need of correctional custody as if he had not been committed by reason of his mental condition. For these reasons we think the ‘credit’ provision is justified.”

**Section 540. Competency to be Proceeded Against:
Order of Hearing**

The trial on the issue of competency to be proceeded against or to be sentenced must proceed in the following order:

(1) The party claiming the incompetency, or the people if the proceedings were instituted upon the court’s motion and over the protest of the defendant, has the burden of proving such incompetency and must open the case and offer evidence.

(2) The opposing party may then open his case and offer evidence.

(3) The parties may then respectively offer rebutting testimony only, unless the court, for good reason in furtherance of justice, permits them to offer evidence upon their original cause.

(4) When the evidence is concluded, unless the case is submitted to the court or to the jury on either or both sides without argument, the party seeking to prove incompetency may commence and may conclude the closing argument.

(5) If the indictment or information be for an offense punishable by death, two counsel on each side may argue the case. In other cases the argument may be restricted to one counsel on each side.

(6) If the trial is by a jury, the court then must charge them stating all matters of law necessary for their information in giving their verdict.

COMMENT

Section 540. Competency to be Proceeded Against: Order of Hearing

This section is adapted from *Penal Code Section 1369*. It is modified to apply to cases in which the court has ordered a hearing on the issue of fitness to proceed without the consent of the defendant. Otherwise, the hearing procedure is not changed.

Chapter 3. Other Exemptions and Defenses

Section 560. Immunity

(1) Except in the circumstances prescribed in Subsection (2), no person shall be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which

(a) he was required to answer or produce evidence pursuant to a judicial order issued under [Section 1324 of this Code]; and

(b) but for the order issued under [Section 1324 of this Code] he would have been privileged to withhold the answer given or the evidence produced by him.

(2) The immunity provided by Subsection (1) shall not extend to a prosecution or penalty or forfeiture for any perjury, false swearing or contempt committed in answering, failing to answer, producing, or failing to produce evidence in accordance with a judicial order issued under [Section 1324 of this Code].

COMMENT

Section 560. Immunity

The present basic¹ California immunity provision, *Penal Code Section 1324*, is based, as are parallel provisions of other states, upon the Model Witness Immunity Act. The text of the California provision is as follows:

[Compelling witness to give testimony or offer evidence which may be incriminating. Conditions: Effect.] In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the district attorney of the county in writing requests the superior court in and for that county to order that person to answer the question or produce the evi-

¹ There are some 23 statutory provisions dealing with immunity. *Penal Code Section 114a* treats immunity in investigations of violations of prize-fighting laws. Other sections are found throughout the codes and relate, for the most part, to administrative hearings.

dence, a judge of the superior court shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order.

1. Structure.

Penal Code Section 1324 now appears in the "Code of Criminal Procedure." It serves two functions: (a) it establishes a procedure by which immunity can be offered; (b) it establishes the immunity as a defense to a subsequent criminal charge. As such, it could properly be located in either a substantive or a procedural code.

Of the other modern codes, only Minnesota (*40 Minn. Stats. Ann. Section 609.09*) and Wisconsin (*Wisc. Stats. Ann. Section 325.34*), place the immunity provision in their substantive codes. The Model Penal Code, Louisiana and Illinois do not. *Proposed New York Penal Law Section 70* contained an elaborate, comprehensive immunity provision. (The text of this provision appears in the Appendix to this comment.) The deletion of the immunity provision from the New York Code is explained on the grounds that immunity, double jeopardy and the statute of limitations are really not trial defenses. They

"are never presented to or determined by a jury. Rather, they involve legal impediments to prosecution which are collateral to the issue of guilt or in-

nocence and which are litigated and determined upon pre-trial motions . . . Accordingly, they are excised from the new Penal Law bill to await inclusion in the prospective new Code of Criminal Procedure.” McKinney’s Cons. Laws of New York, Ann., Rev. Pen. Law, Special Pamphlet, p. 256.

This draft proposes a compromise, which seems consistent with the different purposes of the immunity provisions. It establishes immunity in the proposed code as a defense, while retaining in the Code of Criminal Procedure the procedure set forth in present *Section 1324* with, however, certain recommended modifications for inclusion when a new code of criminal procedure is drafted. Accordingly, proposed *Section 560* merely establishes any immunity which is the consequence of a *Section 1324* proceeding as a defense to any “prosecution, penalty or forfeiture.” The proposed draft is not intended to change the substantive law in this regard, although, for purposes of internal consistency, several structural and verbal changes have been made.

2. Retention and applicability of the immunity provision.

Every state has some immunity provision, and immunity for compulsory testimony in California dates back at least to 1857. *Ex Parte Rowe*, 7 Cal. 175. A circulation of a prior draft of this command to California prosecuting attorneys resulted in unanimous approval of the retention of the provision. Accordingly, the proposed code retains it.

At the same time, the proposed section does not attempt to incorporate into one section the wide variety and large number of immunity provisions which appear throughout the California codes, particularly in the case of administrative proceedings. (See n¹.) This task is left to later consideration of the particular codes and provisions.

It is recommended that when *Section 1324* is considered in the context of a new code of criminal procedure, the definition of the proceedings in which immunity can be offered should be expanded from felonies and grand jury investigations to include misdemeanors as well. As

one district attorney wrote, "many misdemeanor offenses are quite serious in nature, and in their effects on society, and consequently demand diligent prosecution."

3. Future recommendations with respect to the revision of Section 1324.

Although technically the procedure and scope of *Section 1324* are, by deliberate choice, outside the scope of this memorandum, our consideration of the general problems has resulted in the following suggestions:

(a) *Penal Code Section 1324* places the burden for initiation of the request solely upon the district attorney and requires the judge to hold a hearing and to order the question answered "unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction . . ."

Alternative II of the Model State Witness Immunity Act required that the Attorney General approve the request. None of the other modern codes has adopted this alternative. It is probably not feasible to inject the Attorney General into the criminal proceedings at this stage. By and large, enforcement of the criminal law in California is a local responsibility. Accordingly, this power should continue to be lodged in the district attorney.

(b) In view of the fact that there may be reasons to deny the request, the present hearing provision should also be retained.

(c) A difficult question involves the criteria by which to determine whether to grant or deny the district attorney's request. *Penal Code Section 1324* and *Alternative III of the Model Act* require the court to grant the request unless "it finds that to do so would be clearly contrary to the public interest. . ." Minnesota requires the judge to compel the testimony "if he finds that to do so would not be contrary to the public interest." 40 *Minn. Stat. Ann. Section 609.09*. Although literally different standards, it is unlikely that there is a practical difference. No substantial reason therefore appears to warrant a change in the language.

In any event, the statutes give the district attorney carte blanche in making the request, and confine the judge to a determination about some unamplified "public interest." "Public interest" appears to exclude considerations personal to the witness; what it includes is less clear. Presumably, the judge may be able to prevent an immunity bath, but other situations do not readily come to mind. As ambiguous as it may be, "public interest" seems as good a formulation as is possible.

(d) *Section 1324* broadly requires the judge to deny the request if he finds that the answer to the question "could subject the witness to a criminal prosecution in another jurisdiction." In *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), the Supreme Court of the United States held (pp. 77-80): (1) that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law"; (2) that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him"; and (3) that, therefore, once a state witness has been compelled to testify under an immunity statute, the federal government "must be prohibited from making any . . . use of compelled testimony and its fruits."

Technically, *Murphy* did not involve the state-state problem, but the state-federal one. Nevertheless, the teaching of *Murphy* is clear. Looked at one way, it gives support for continuation of the present broad compass of *Section 1324*. Indeed, a revision of *Section 1324* might consider adding language similar to that of *New York Proposed Penal Law Section 700.00(b)*:

"no such testimony or evidence can be received against him in any criminal proceeding other than one for perjury or contempt."

This recommendation is based upon the fact that the literal language of *Section 1324* might not preclude the use of compelled testimony in a later proceeding, where that testimony is evidence of a different crime or event from that

which was (i) at issue at the proceeding in which testimony was compelled and (ii) is primarily based on other evidence.

On the other hand, it could be urged that there is no longer any need for the California prohibition on compelling witnesses to testify because of a concern that those answers may incriminate in another jurisdiction. For *Murphy* holds that the answers may not be used against the witness in that jurisdiction. In other words, there is no longer any justification for the loss of testimony which California may find desirable to compel for its purposes, because of concern of unfairness to a witness in subjecting him to prosecutions outside California.

(e) The immunity provided by *Section 1324* comes into play—after the witness has complied with the order—“if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him . . .”

This provision gives rise to the possibility of mouse-trapping, *i.e.*, a witness is compelled to answer a question by a court on the theory that the answer might incriminate him, only to be confronted later by a decision that the answer did not and therefore he may be prosecuted. On the other hand, the immunity is—as it constitutionally must be—more extensive than prohibiting the admission of the testimony. The witness “shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence.” This limitation appears to be a reasonable way of controlling an attempt by a witness to immunize himself as to transactions beyond the scope of the question asked. Only Wisconsin and the Illinois Code of Criminal Procedure—of the modern codes—do not contain a similar provision.

APPENDIX

NEW YORK PROPOSED PENAL LAW

Section 70.00 Immunity; defined

A person has "immunity" within the meaning of this article, when, having given testimony or produced evidence in any investigation or proceeding, (a) he cannot be prosecuted or subjected to any penalty or forfeiture, other than a prosecution or action for perjury or contempt, for or on account of any transaction, matter or thing concerning which he testified or produced evidence, and (b) no such testimony or evidence can be received against him in any criminal proceeding other than one for perjury or contempt.

Section 70.05 Immunity from prosecution

A person may not be convicted of or prosecuted for an offense when he has obtained immunity therefor under circumstances described in section 70.15.

Section 70.10 Immunity; authorities competent to confer it

In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to any crime defined in this chapter or any felony defined in any other chapter, such court, magistrate, grand jury or joint legislative committee may confer immunity in accordance with the provisions of section 70.15.

Section 70.15 Immunity; how and when conferred

1. In any investigation or proceeding where, by express provision of section 70.10, or by express provision of any other statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given

or the evidence produced by him, then immunity shall be conferred upon him, as provided herein.

2. As used in this section "competent authority" means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or to produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of them in his official capacity, is a party, when such court is expressly requested by the attorney-general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.

Provided, however, that no such authority shall be deemed a competent authority within the meaning of

this section unless expressly authorized by statute to confer immunity.

3. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

4. If, after compliance with the provisions of this section, or any other similar provisions of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure and neglect shall not deprive such person of any immunity otherwise properly conferred upon him.

Section 70.20 Waiver of immunity

When a person is called or appears in any investigation or proceeding for the purpose of giving testimony or producing evidence under circumstances in which he may possibly obtain immunity pursuant to the provisions of section 70.15, he may execute, acknowledge and file in the office of the county clerk a statement expressly waiving such immunity; and in such case he obtains no immunity through the giving of testimony or the production of evidence.

DIVISION 7. SPECIFIC OFFENSES

Chapter 1. Anticipatory and Accessorial Crimes

Section 800. Attempt: Definition

A person is guilty of an attempt to commit a crime when, with intent to engage in conduct which would constitute such crime where the circumstances as he believes them to be, he performs or omits to perform an act which constitutes a substantial step toward commission of the crime.

COMMENT

Section 800. Attempt: Definition

The elements of attempt as defined in this draft consist of a state of mind and an act. The nature of these elements is discussed below.

(1) **State of mind.** The California statute does not define "attempt." However, it is clear under the case law that there must be a "specific intent" to commit a particular crime. See, e.g., *People v. Snyder*, 15 Cal. 2d 706, 104 P.2d 639 (1940).

However, as is brought out in the Model Penal Code commentary, this may be oversimplification. See *Tentative Draft No. 10*, p. 27. The intent requirement should be satisfied where the defendant intends to engage in the conduct which will constitute the crime. He need not necessarily contemplate all of the surrounding circumstances included in the definition of the crime. Assume that raping a fifteen year old girl is a more aggravated crime than raping a seventeen year old. Assume also that negligence as to the age of the victim suffices for that element of the crime. Is there not a more aggravated attempt where a fifteen year old is attacked, even if it can be shown that the defendant was only negligent as to the age of the victim?

The draft deals with this problem by requiring an intent to engage in conduct which constitutes the crime rather than a specific intent to commit the crime. In doing this, it follows the Model Penal Code (see *Section 5.01(1)* in Appendix), and *Wisconsin Stats. Ann. Section 939.32*

which requires that the defendant intend "to perform acts and attain a result which, if accomplished, would constitute such crime." The other new codes ignore this problem.

(2) **Act.** No one will dispute the notion that there cannot be an attempt without some act tending to the commission of the crime attempted. In California, as in other jurisdictions, the courts have distinguished between acts which are said to be preparatory and not to constitute an attempt and other acts which are said to constitute an attempt. There have been many reported decisions. Although they have not always been consistent, it can be said that generally something very close to a completed crime is required before the courts will find an attempt. For example, compare two abortion decisions. In *People v. Gallardo*, 41 Cal. 2d 57, 257 P. 2d 29 (1953), all arrangements had been made, the money paid, the hospital records prepared, and the prospective abortee was in the waiting room of the hospital. The court said that this was preparation only, not an attempt. In *People v. MacEwing*, 216 Cal. App. 2d 33, 30 Cal. Rptr. 476 (1953), the fee was paid and the abortee was prepared for the operation, and given a shot to "relax her." There was an examining bed with stirrups, a tray of instruments and an anesthetic. A conviction for attempted abortion was affirmed. There are many other decisions in the abortion area, and it is safe to say that the abortee must be very close to the defendant's instruments before the courts will find an attempt.

There are a number of other cases which in general are consistent with the abortion cases. For example, consider the frequently cited decision in *People v. Murray*, 14 Cal. 159 (1859). Defendant was charged with an attempt to contract an incestuous marriage with his niece. They expressed their intent to marry, eloped for that purpose and sent someone to get the magistrate to perform the ceremony. The court thought that there would be no attempt until they were before the magistrate ready to take their vows.

There have been a few instances where the defendants' acts, although preliminary, are so dangerous that the courts have been willing to find an attempt. See, e.g., *People v. Lanzit*, 70 Cal. App. 498, 233 Pac. 816 (1925),

where the defendant planted a bomb in his wife's restaurant with the help of a feigned accomplice who knew that his purpose was to kill his wife. Despite the absence of the wife, the court found an attempt.

It is the purpose of the draft to draw the definition of attempt well back into the area of what the courts now call preparation. Once the actor has manifested his dangerousness there is an attempt, providing intent can be shown. It should not be necessary for police officers to wait until the bomb is placed in readiness for the intended victim, or until the defendant starts to kindle the fire to burn the building, to make the arrest. However, there still must be a preparatory act which is either a substantial step to commission of the crime or which creates a substantial danger that the crime be committed. The Model Penal Code (see *Section 5.01(2)* in Appendix) includes examples of acts which should not be held insufficient as a matter of law to constitute a substantial step. It is felt that this listing more properly belongs in the commentary than in the code, so it is incorporated here:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

The result of this formulation should be to overrule a number of California decisions. See, *e.g.*, *People v. Buffum*, 40 Cal. 2d 709, 256 P.2d 317 (1953); *People v. Gallardo, supra*; *People v. Murray, supra*; *cf. People v. Miller*, 2 Cal. 2d 527, 42 P.2d 308 (1935).

The new *Illinois Criminal Code of 1961 (Section 8-4(a))* reaches a similar result ("an act which constitutes a substantial step"), as does the Minnesota Code (*Minn. Stats. Ann. Section 609.17(1)*) ("act which is a substantial step toward, and more than mere preparation for, the commission of the crime").

Section 801. Attempt: Impossibility

In a prosecution for an attempt, it is no defense that it was impossible to commit the crime.

COMMENT

Section 801. Attempt: Impossibility

The Model Penal Code attempts to combine in its definition of attempt the situations where impossibility, factual or legal, should be no defense. As a result, the language (see *Section 5.01(1)* in the Appendix) is so cumbersome as to be almost incomprehensible. This draft attempts to separate the impossibility problem from the definitional problem.

Impossibility has for all practical purposes been eliminated as a defense in California judicial decisions. See, *e.g.*, *People v. Lee Kong*, 95 Cal. 666, 30 Pac. 800 (1892) (defendant shot at a hole in the roof thinking a policeman was observing his lottery game through the hole; policeman elsewhere on roof; assault with intent to kill conviction upheld); *People v. Camodeca*, 52 Cal. 2d 142, 338 P.2d 903 (1959) (defendant falsely stated to a bar owner that there were charges filed against him with state regulatory agency which could be "fixed" by payment to confidential persons; police, cooperating with bar owner, observed his next visit to demand the money; attempted grand theft and extortion convictions affirmed); *People v. Rojas*, 55 Cal. 2d 252, 10 Cal. Rptr. 465, 358 P.2d 921 (1961) (defendants were convicted of receiving stolen property; the property had already been recovered by the police; the court upheld the conviction as an attempt).

The purpose here then should be to draft a simple impossibility provision, codifying California decisions, without muddying the waters. The draft in very simple terms states that impossibility is not a defense to a charge of attempt to commit a crime. The draft provision is similar to that in the *New York Revised Penal Law* (Section 110.10); compare *Illinois Ann. Stats. Ch. 38, Section 8-4(b)* ("It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted."); *Minn. Stats. Ann. Section 609.17 (2)* ("An act may be an attempt notwithstanding the circumstances under which it was performed or the means employed to commit the crime intended or the act itself were such that the commission of the crime was not possible, unless such impossibility would have been clearly evident to a person of normal understanding.")

Section 802. Attempt: Renunciation

In a prosecution for an attempt, it is a defense that the person avoided commission of the crime, either by preventing it or by abandoning his efforts to commit it, under circumstances manifesting a voluntary and complete renunciation of his criminal intent. If the act or omission involved in the attempt creates a danger to the person or property of another, renunciation is not a defense unless it is accompanied by a successful effort to abate the danger.

COMMENT

Section 802. Attempt: Renunciation

A defense of renunciation is recognized in California decisions by way of dictum. *People v. Carter*, 73 Cal. App. 495, 238 Pac. 1059 (1925); *People v. Von Hecht*, 133 Cal. App. 2d 25, 283 P.2d 764 (1955). The abandonment must be voluntary and probably followed by affirmative effort to prevent completion of the crime. See, however, CALJIC 102 and 103 which suggest that once the acts which constitute an attempt have been committed there can be no abandonment.

The draft includes a limited defense of renunciation. This can perhaps be justified on the ground that the draft makes criminal what formerly would have been considered

to be mere preparation, and the criminal law should encourage renunciation at the earlier preparatory stages. It provides that renunciation will not be a defense unless it is accompanied by substantial and successful efforts to abate any danger created to person or property of others. See, *e.g.*, *People v. Grant*, 105 Cal. App. 2d 347, 233 P.2d 660 (1951), where defendant bought life insurance on wife and children, arranged for their passage on plane, loaded an incendiary bomb in a suitcase set to go off after the plane departed, and checked the suitcase. The suitcase was moved to the vicinity of the aircraft. The suitcase blew open and started a fire after the crew was aboard but before the passengers were aboard. The fire was extinguished with no damage. Shortly before the suitcase blew open, defendant attempted to regain it. The alleged abandonment was held to be no defense, and would be no defense under the draft.

NOTE: *Procedural problems.* The procedural problems arising from variance in proof, that is, pleading completed crime and proving attempt or vice versa, have not been considered. See *Penal Code Sections 663, 1159*.

Section 805. Solicitation: Definition

A person is guilty of solicitation to commit a felony when with intent to promote or facilitate its commission he commands, encourages or requests another person to perform or omit to perform an act which constitutes such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

COMMENT

Section 805. Solicitation: Definition

The draft proposal is to have a general statute making it a crime to solicit the commission of any felony. The present California Penal Code limits solicitation to a list of serious felonies. See, *Section 653(f)*. There are also special statutes. See, *e.g.*, *Section 11300* (visits to gambling ship); *Section 276* (solicitation to submit to abortion); *Section 647(b)* (prostitution); *Section 647(d)* (loitering to solicit lewd, lascivious or unlawful act); *Health and Safety Code Sections 11502, 11502.1, 11532* (soliciting minors to violate narcotics laws). A general statute seems preferable to the present statutory scheme. A listing of crimes, as in the California statute, may result in the overlooking of some

instance of solicitation which should be criminal. This was the reason for enacting in 1957 *Penal Code Section 276*, which makes it a crime to solicit a woman to submit to an abortion. This remedied the result reached in *People v. Buffum*, 40 Cal. 2d 709, 256 P.2d 317 (1953), where the court held it would not be an attempt to make arrangements in California for abortions to be committed in Mexico.

We reject the Model Penal Code proposal to make solicitation to commit a misdemeanor a crime. Under such a statute it would be a crime to solicit the commission of adultery or fornication (if criminal). This could result in the possibility of such ludicrous results as to make it criminal for a minor to solicit a purchase of liquor or any adult to ask for a drink at a bar after closing time. One can also imagine possible solicitations to commit Vehicle Code offenses such as speeding or running a red light. We recognize that some of these same risks arise with statutes making conspiracy and attempt to commit a misdemeanor criminal. Thus, our present proposals limit felonious conspiracies to commit misdemeanors to those which involve dangerous conduct or those committed pursuant to a common plan. See Section 820, *infra*. However, we feel that there are additional dangers in making solicitation to commit a misdemeanor criminal, for example in the civil rights area. It seems preferable to make solicitation to commit specific misdemeanors criminal, for example, as already proposed in Section 1609 (soliciting sexual relations under circumstances likely to cause offense to other persons).

The Model Penal Code while making solicitation a general offense provides for mitigation or dismissal where the conduct is inherently unlikely to result in a crime. See *Section 5.05(2)* (Appendix).

New York, Illinois and Wisconsin make solicitation an offense under their new codes. Minnesota does not. Apparently in such a jurisdiction solicitation goes unpunished unless it amounts to an attempt. See, *e.g.*, *State v. Lowrie*, 237 Minn. 240, 54 N.W. 2d 265 (1952).

Section 806. Solicitation: Availability of Defenses

(1) In any prosecution for solicitation, it is a defense that if the criminal object was achieved, the defendant

would not be guilty of a crime under the law defining the crime or as an accomplice under Sections 454(1) or 454(2).

(2) In any prosecution for solicitation, it is no defense that:

(a) the person solicited would not be guilty of the crime which was the object of the solicitation because of his lack of criminal responsibility or other legal incapacity; or

(b) the crime can be committed only by a particular class of persons to which either the solicitor or the person solicited does not belong.

COMMENT

Section 806. Solicitation: Availability of Defenses

Section 806(1) incorporates the defense set forth in the conspiracy draft, Section 813(1). See commentary to that section.

Section 806(2) makes it clear that it is no defense to a charge of solicitation that the person solicited would not be guilty of the crime which was the object of the solicitation because of lack of criminal responsibility (*e.g.*, insanity), or other legal incapacity (*e.g.*, under age), or the crime could be committed only by a particular class of persons to which either the solicitor or the person solicited does not belong (*e.g.*, the solicitor tries to get a bank official to falsify records, a crime which can be committed only by a bank official). The law at present is to the effect that it is not essential to bribery that either the person offering the bribe or the person offered the bribe have the official capacity to perform the action required. See, *e.g.*, *People v. Guillory*, 178 Cal. App. 2d 854, 3 Cal. Rptr. 415 (1960).

Section 810. Conspiracy: Definition

A person is guilty of conspiracy to commit a crime if:

(1) he agrees with one or more other persons that he or one of them will engage in conduct which constitutes such crime;

(2) he does so with the intention of engaging in, promoting or assisting in the conduct which constitutes such crime; and

(3) he or one of them performs an overt act in pursuance of the agreement.

COMMENT

Section 810. Conspiracy: Definition

This definition of conspiracy eliminates all of the conspiratorial objectives of present *California Penal Code Section 182* except the commission of a crime. In this it is consistent with the Model Penal Code and the new codes. From the reported decisions it appears that, aside from *California Penal Code Section 182*, subdivision 1, only subdivision 5 is being used. Subdivision (5) makes criminal a conspiracy to do "any act injurious to the public health, to public morals, or for the perversion or obstruction of justice, or due administration of the laws." The facts of reported cases typically are such as to fall under a conspiracy to commit a crime. See, e.g., *Calhoun v. Superior Court*, 46 Cal. 2d 18, 291 P.2d 474 (1953) (conspiring to solicit campaign funds from alcoholic beverage licenses).

The culpability requirement is intent to engage in, promote or assist in the conduct which constitutes the crime. It suffices if the agreement is to engage in conduct which constitutes the crime. Thus, assume it is an aggravating factor in burglary to carry a deadly weapon, and only the co-conspirator carried such a weapon. It will be necessary to show that the defendant knew this to convict him of the aggravated conspiracy. If recklessness as to the age of the victim suffices in statutory rape, it will be enough to show that the conspirators had that mental state. This is in accordance with existing California law. For example, in *People v. Smith*, 63 Cal. 2d 779, 48 Cal. Rptr. 382, 409 P.2d 222 (1966), the court pointed out that it would suffice to prove conspiracy to commit burglary if it was shown that the defendant intended to enter the building with intent to commit theft. It would be unnecessary to show that when he entered the building with that intent he knew this would constitute burglary. Cf. *People v. Marsh*, 58 Cal. 2d 732, 26 Cal. Rptr. 300, 376 P.2d 300 (1962) ("to uphold a conviction for conspiracy to violate a 'public welfare offense' there must be a showing that the accused knew of the law and intended to violate it"). This is the approach of the Model Penal Code. The other new codes do not deal with the problem. Whether a jurisdictional element having nothing to do with the harm involved in the offense must be in the contemplation of

the defendant is a matter which will be taken up in connection with the definition of the term "material element."

The overt act requirement is in accord with present California law. The proposal rejects the Model Penal Code notion that the overt act requirement should apply only to minor felonies and misdemeanors.

The draft does not deal specifically with the so-called Kotteakos problem, sometimes called the problem of multiple conspiracies. See, *Kotteakos v. United States*, 328 U.S. 750 (1946). Kotteakos involved a charge of a single conspiracy to induce financial institutions to grant credit upon the basis of false information in applications. One Brown acted as a broker in placing the applications. The various applicants or groups of applicants had no relation to each other. The court said there were at least eight separate conspiracies proved and that as to the applicants the variance was prejudicial.

So far this problem has rarely arisen in California cases. The leading case is *Bompensiero v. Superior Court*, 44 Cal. 2d 178, 281 P.2d 250 (1955). The defendant and others were charged among other things with a conspiracy to ask and receive bribes from restaurant owners in return for liquor licenses, payments to be made to one Berry, the district liquor control administrator. The defendant in a motion for a writ of prohibition claimed that the evidence before the grand jury showed a series of isolated conspiracies in only one of which he was involved. The Supreme Court thought that the similarity of the manner in which the restaurant owners were contacted and the way the bribery was accomplished tended to show a "common plan of participation," which was enough. The new codes of other jurisdictions do not reach this problem.

We feel that the draft gives ample room for application of the Kotteakos doctrine, or some possible variation.

Section 811. Conspiracy: Multiple Criminal Objectives

If a person conspires to commit a number of crimes, he may be convicted of only one conspiracy so long as those multiple crimes are the object of the same agreement.

COMMENT

Section 811. Conspiracy: Multiple Criminal Objectives

This is similar to *Model Penal Code Section 5.03(3)*, and is in accordance with present California law. Thus, in *People v. Cossey*, 97 Cal. App. 2d 101, 217 P.2d 133 (1950), the defendant, operating a collection agency, misappropriated collections. He was convicted of ten conspiracy counts growing out of ten similar transactions and given consecutive sentences on part of the counts. The court held that the conspiracy sentences could not be consecutive since there was but one conspiracy. See, also, *People v. Carter*, 192 Cal. App. 2d 648, 13 Cal. Rptr. 541 (1961) (prosecution under two subdivisions of conspiracy section; one conspiracy proved; only one sentence could be imposed). New codes in other states do not deal with this problem.

Section 812. Conspiracy: Scope

If a person is guilty of conspiring with one co-conspirator to commit a crime and knows or contemplates that his co-conspirator has conspired or will [may] conspire with another to commit the same crime, he is guilty of conspiring with any such other person to commit that crime, whether or not he knows of his identity.

COMMENT

Section 812. Conspiracy: Scope

The draft does not purport to change the familiar rule that a person can be convicted of conspiring with another person even though he does not know his identity. See, e.g., *People v. Van Eyk*, 56 Cal. 2d 471, 15 Cal. Rptr. 150, 364 P.2d 326 (1961); CALJIC 940. The bracketed portion would perhaps go a little further. If A hires B to murder his wife he may not know or contemplate that B will hire C to assist him or commit the crime. But a jury might find that he contemplated that B might use a third person.

Section 813. Conspiracy: Availability of Defenses

(1) In any prosecution for conspiracy, it is a defense that if the criminal object was achieved, the defendant

would not be guilty of a crime under the law defining the crime or as an accomplice under Section 454(1) or 454(2).

(2) In any prosecution for conspiracy, it is no defense that:

(a) a co-conspirator would not be guilty of conspiracy or the crime which was its object because of his lack of criminal responsibility or other legal incapacity, or because of his lack of culpability required for the crime; or

(b) the crime can be committed only by a particular class of persons to which either the defendant or a co-conspirator does not belong; or

(c) a co-conspirator has legal immunity from prosecution, or has not been prosecuted for or convicted of the conspiracy or a crime based upon the conduct in question, or has previously been acquitted; or

(d) the agreement of a purported co-conspirator was feigned.

COMMENT

Section 813. Conspiracy: Availability of Defenses

Subsection (1) reflects the same policies that are embodied in Section 454(1) and (2) of the complicity draft. See Tentative Draft No. 1 and commentary. A person who cannot be convicted of the substantive crime under the complicity provisions should not be convicted of conspiracy. However, note that the other person may still be convicted under Subsection (2)(a) and (b). Examples of persons who would have the defense are the female in a statutory rape case or an unmarried woman in an adultery case, assuming adultery can only be committed by married persons.

Subsection (2)(a) makes it no defense to the *defendant* that a co-conspirator lacks criminal responsibility, has some legal incapacity, or lacks the culpability required for the crime. The Model Penal Code is consistent insofar as criminal irresponsibility or incapacity is concerned. It does not treat the problem of culpability. It should be no defense to the *defendant* that his co-conspirator is legally irresponsible (criminally insane), or suffers under such incapacity as being under the legal age of capacity to commit a crime. As for lack of culpability, an example might be adultery, assuming that the

crime can be committed only by a married person. If the male was married he could possibly be convicted of conspiracy to commit adultery. The unmarried female could not by virtue of Subsection (1).

Subsection (2)(b) makes it no defense to the defendant that the substantive crime can be committed only by a particular class of persons to which either he or a co-conspirator does not belong. This is consistent with Section 453(1) relative to complicity. Assume that falsification of bank records is defined to make it an offense only if done by a bank employee. If an employee agrees with a non-employee to falsify records, it should be no defense to either in a conspiracy prosecution that only one of them could be convicted of the substantive crime. However, an under age female cannot commit statutory rape. Subsection (2)(b) would seem to permit her conviction for conspiracy to commit that offense, but it must be read with complicity Section 454(1) which would give her a defense.

Subsection (2)(c) makes it no defense to the defendant that a co-conspirator has legal immunity from prosecution, or not been prosecuted or convicted or has previously been acquitted. It is the same in substance as Section 453(2) relative to complicity. The Model Penal Code does not treat this problem, except for immunity because of its so-called unilateral approach to conspiracy. The *Illinois Criminal Code of 1961* (Section 8-2(b)) provides:

It shall not be a defense to a conspiracy that the person or persons with whom the accused is alleged to have conspired:

- (1) Has not been prosecuted or convicted, or
- (2) Has been convicted of a different offense, or
- (3) Is not amenable to justice, or
- (4) Has been acquitted, . . .

Subsection (2)(c) is consistent with existing law, except that there is a conflict of authority in regard to whether a defendant can be prosecuted for conspiracy when his co-conspirator has been acquitted. No California decision has been found. Immunity poses no problem. The fact that a co-conspirator is a diplomat, or has been granted immunity for his agreement to testify, should not exempt the *defendant* from prosecution.

Subsection (2)(d) provides for liability of the *defendant* for conspiracy even if the co-conspirator's purported agreement is feigned.

[Section 814. Conspiracy: Duration

For purposes of Section XX [limitation of actions]:

(1) A conspiracy terminates when its objectives are accomplished [when the crime or crimes which are its object is or are committed] or the agreement is abandoned by the defendant and his co-conspirators.

(2) If a defendant abandons the agreement, the conspiracy is terminated as to him only when he advises those with whom he conspired of his abandonment or informs the law enforcement authorities of the existence of the conspiracy and his participation.]

COMMENT

Section 814. Conspiracy: Duration

This section, which is based on *Model Penal Code, Proposed Official Draft, Section 5.03(7)*, defines the duration of a conspiracy for the purpose of limitation of actions. It is anticipated that it will ultimately be placed in another part of the code, perhaps in a more general provision, hence it is placed in brackets.

Subsection (1) states the proposition that a conspiracy continues until its objectives are accomplished or until the agreement is abandoned by its parties. Under this subsection, the duration of the conspiracy would include the period of escape and division of the spoils. The bracketed part raises the question whether the conspiracy should be considered to terminate earlier, that is, at the time that the object of the crime is committed. *Cf. People v. Crosby*, 58 Cal. 2d 713, 25 Cal. Rptr. 847, 375 P.2d 839 (1962). For the purposes of the statute of limitations, probably either alternative is satisfactory.

We adhere to the rationale of *Grunewald v. United States*, 353 U.S. 391 (1957) and *Forman v. United States*, 361 U.S. 416 (1960), to the effect that an agreement to conceal the conspiracy should not be implied merely because there is a conspiracy.

Subsection (2) provides for the running of the statute of limitations as to an individual when he abandons the

conspiracy. The statute begins to run when he advises his co-conspirators of his abandonment or informs law enforcement authorities of the existence of the conspiracy and his participation. This is substantially in accordance with existing law. *People v. Crosby, supra*.

Model Penal Code Section 5.03(7) provides for a presumption that a conspiracy is abandoned where there are no overt acts during the applicable limitation period.

[Section 815. Conspiracy: Joinder; Severance; Venue

(1) **Joinder.** Persons charged with conspiracy may be prosecuted jointly if:

(a) they are charged with conspiring with each other; or

(b) the conspiracies charged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct.

[Neither the liability of any defendant nor the admissibility against him of the acts or declarations of another shall be enlarged by such joinder.]

(2) **Severance.** In a joint prosecution the court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial.

(3) **Venue.** A conspiracy may be prosecuted in any county where an overt act was committed.]

COMMENT

Section 815. Conspiracy: Joinder; Severance; Venue

This section, which is based on *Model Penal Code, Section 5.03(4)*, sets forth the applicable joinder, severance, and venue provisions. It is placed in brackets since it is anticipated that it will ultimately be placed in another part of the code, perhaps in a more general form.

Under Subsection (1) co-conspirators can be tried jointly if charged with conspiring with each other, or where conspiracies, whether with the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct. This ap-

pears to be in accord with existing law (*Penal Code Section 954*), although no California decision has been found where there is discussion of the problem of joining related conspiracies which have different parties.

The last sentence of Subsection (1) states a well-settled rule of evidence, but also emphasizes that the admissibility of evidence of the acts and declarations of others will not be enlarged by joining two conspiracies. This would appear to be the result under *Evidence Code Section 1223* and is therefore placed in brackets.

Subsection (2) provides the possibility of a severance, a special verdict, or other appropriate measures where the joinder of defendants or counts makes it necessary to assure a fair trial. Severance and special verdicts should be treated generally in the procedure part of the code, as in *Penal Code Sections 954, 1150, 1152-1156*. For this reason the subsection is placed in brackets.

Subsection (3) places venue for conspiracy prosecutions in any county where an overt act occurred. This is in accordance with *Penal Code Section 182*. The Model Penal Code provides an additional alternative, the county where the defendant entered the conspiracy.

Section 820. Attempt, Solicitation and Conspiracy: Grading

(1) Except as otherwise provided in this section attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious crime which is attempted or solicited or is an object of the conspiracy.

(2) Attempted murder, and solicitation and conspiracy to commit murder are felonies of the first degree.

(3) A conspiracy to commit a misdemeanor involving danger to the person or to commit a series or number of misdemeanors pursuant to a common scheme or plan is a felony of the third degree.

COMMENT

Section 820. Attempt, Solicitation and Conspiracy: Grading

The basis of the grading proposal is that a person who attempts or solicits commission of a crime, or conspires to commit a crime is as dangerous as one who succeeds in his object. For this reason, the basic penalty is the

same except where the object is murder. In this case, the offense is a felony of the first degree.

The *California Penal Code* (Section 182) makes a conspiracy to commit a misdemeanor a felony-misdemeanor with a maximum imprisonment of three years. In practice, at least as reflected in reported cases, such severe sanctions are rarely invoked except in cases where something in the nature of gang or group activity is involved. See, e.g., *People v. Mallotte*, 46 Cal. 2d 59, 292 P.2d 517 (1956) (call girl madam); *People v. Dockerty*, 178 Cal. App. 2d 33, 2 Cal. Rptr. 722 (1960) (worthless roofing jobs); *People v. Scott*, 224 Cal. App. 2d 146, 36 Cal. Rptr. 402 (1964) (sale of dangerous drugs); *People v. Seter*, 216 Cal. App. 2d 238, 30 Cal. Rptr. 759 (1963) (petty theft; sale of memberships in phony organization); cf. *People v. Martinez*, 239 Cal. App. 2d 161, 48 Cal. Rptr. 521 (1966) (disturbing the peace; gang fight).

Section 820(3) represents an attempt to limit the scope of felony conspiracy to commit a misdemeanor to those misdemeanors which involve the probability of personal injury or planned, repetitive criminality.

APPENDIX**MODEL PENAL CODE***Proposed Official Draft***Section 5.01. Criminal Attempt.**

(1) *Definition of Attempt.* A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) *Conduct Which May Be Held Substantial Step Under Subsection (1)(c).* Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed

for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) *Conduct Designed to Aid Another in Commission of a Crime.* A person who engages in conduct designed to aid another to commit a crime which would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

(4) *Renunciation of Criminal Purpose.* When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

Section 5.02. Criminal Solicitation.

(1) *Definition of Solicitation.* A person is guilty of solicitation to commit a crime if with the purpose of pro-

moting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

(2) *Uncommunicated Solicitation*. It is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.

(3) *Renunciation of Criminal Purpose*. It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Section 5.03. Criminal Conspiracy.

(1) *Definition of Conspiracy*. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

(2) *Scope of Conspiratorial Relationship*. If a person guilty of conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

(3) *Conspiracy With Multiple Criminal Objectives*. If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

(4) *Joinder and Venue in Conspiracy Prosecutions.*

(a) Subject to the provisions of paragraph (b) of this Subsection, two or more persons charged with criminal conspiracy may be prosecuted jointly if:

(i) they are charged with conspiring with one another; or

(ii) the conspiracies alleged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct.

(b) In any joint prosecution under paragraph (a) of this Subsection:

(i) no defendant shall be charged with a conspiracy in any county [parish or district] other than one in which he entered into such conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired; and

(ii) neither the liability of any defendant nor the admissibility against him of evidence of acts or declarations of another shall be enlarged by such joinder; and

(iii) the Court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to promote the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial.

(5) *Overt Act.* No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

(6) *Renunciation of Criminal Purpose.* It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(7) *Duration of Conspiracy.* For purposes of Section 1.06(4):

(a) conspiracy is a continuing course of conduct which terminates when the crime or crimes which

are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired; and

(b) such abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation; and

(c) if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

Section 5.04 Incapacity, Irresponsibility or Immunity of Party to Solicitation or Conspiracy.

(1) Except as provided in Subsection (2) of this Section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:

(a) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if he believes that one of them does; or

(b) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

(2) It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under Section 2.06(5) or 2.06(6)(a) or (b).

Section 5.05. Grading of Criminal Attempt, Solicitation and Conspiracy; Mitigation in Cases of Lesser Danger; Multiple Convictions Barred

(1) *Grading.* Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the con-

spiracy. An attempt, solicitation or conspiracy to commit a [capital crime or a] felony of the first degree is a felony of the second degree.

(2) *Mitigation.* If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section, the Court shall exercise its power under Section 6.12 to enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.

(3) *Multiple Convictions.* A person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime.

DIVISION 10. CRIMES AGAINST LIFE AND SECURITY OF PERSON

Chapter 1. Definitions

Section 1400. Definitions

(1) "Human being" means a person who has been born and is alive;

(2) "Bodily injury" means physical pain, illness, unconsciousness, or any impairment of physical condition;

(3) "Serious bodily injury" means bodily injury which creates: serious permanent disfigurement; a substantial risk of death or serious, permanent disfigurement; severe or intense physical pain; or protracted loss or impairment of consciousness or of the function of any bodily member or organ;

(4) "Deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to the actor to be capable of producing death or serious bodily injury.

COMMENT

Section 1400. Definitions

The definitions set forth in Section 1400(1)-(4) are derived principally from the *Model Penal Code, Section 210.0*, with the exceptions that "unconsciousness" has been expressly set forth in Section 1400(2) and (3) as a form of bodily injury and the scope of "serious bodily injury" has been expanded to include bodily injury which creates a substantial risk of serious, permanent disfigurement, or severe, or intense physical pain.

Chapter 2. Life

Introduction.

This draft proposes a thorough modernization and revision of the law of homicide. The main features of the draft are:

1. Abolition of degrees of murder.
2. Division of reckless homicides between murder and manslaughter, the line being drawn depending upon the presence or absence of extreme indifference to life.
3. Abolition of the felony-murder doctrine with substitution of a presumption of extreme indifference when the homicide occurs in the course of specified felonies, as the result of a dangerous act.
4. Expansion of the provocation doctrine to take account to some extent of subjective factors.
5. Removing negligent homicides from the manslaughter category and denominating them as "negligent homicides."
6. Retention of the separate proceeding to determine sentence in capital cases (assuming capital punishment), with some modifications.
7. Limitation of capital punishment, assuming retention, to several narrowly drawn categories.

The draft relies to some extent on the *Model Penal Code*, the homicide provisions of which are set forth in an Appendix.

No position is taken at this time on whether capital punishment should be retained.

Section 1410. Criminal Homicide

A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or by criminal negligence causes the death of another human being.

COMMENT

Section 1410. Criminal Homicide

This section defines criminal homicide for the purpose of distinguishing it from non-criminal homicide. Crimi-

nal homicide can be committed intentionally, knowingly, recklessly or by criminal negligence.

Section 1415. Murder

(1) Except as provided in Section 1420, criminal homicide constitutes murder when:

- (a) it is committed intentionally or knowingly; or
- (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the defendant was engaged in or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit armed robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary [while armed], aggravated kidnapping or felonious escape, in the furtherance of which he committed, or induced or aided another to commit, a dangerous act from which death resulted.

(2) The presumptions created by Subsection (1)(b) are presumptions affecting the burden of producing evidence.

(3) A person convicted of murder shall [may] be sentenced to life imprisonment [or death, as provided in Section 1416].

COMMENT

Section 1415. Murder

Abolition of degrees of murder. An important change proposed in the draft is the abolition of degrees of murder. The purpose of separating murder into degrees was to lessen the impact of the death penalty. First adopted by Pennsylvania in 1794 it was copied in California in 1856, with some modifications.

The present California version, *Penal Code Section 189*, follows:

All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder

of the first degree; and all other kinds of murder are of the second degree.

The concept of premeditation and deliberation as distinguished from mere intent to kill has troubled the California Supreme Court in scores of cases. The CALJIC Instruction (303), set forth in an Appendix, is based on the currently controlling decisions. See, *e.g.*, *People v. Bender*, 27 Cal. 2d 164, 163 P.2d 8 (1945).

A careful reading of the instruction makes it apparent that the California courts are doing what Justice Cardozo called giving the jury the power to exercise mercy, but doing it in a "mystifying cloud of words." Cardozo, *Law and Literature*, 97, 99-101 (1931). Indeed, the court has frankly recognized this. Thus, in *People v. Holt*, 25 Cal. 2d 59, 153 P.2d 21 (1944), the court said:

Dividing intentional homicides into murder and voluntary manslaughter was a recognition of the infirmity of human nature. Again *dividing the offense of murder into two degrees is a further recognition of that infirmity and of difference in the quantum of personal turpitude of the offenders*. The difference is basically in the offenders but is to be measured by the character of the particular homicide. (Emphasis added.)

Quoting the language from *Holt*, in *People v. Wolff*, 61 Cal. 2d 795, 40 Cal. Rptr. 271, 394 P.2d 959 (1964), the court applied it in the case of a defendant who was not fully normal or mature, and was fifteen years old. The court said that the defendant had ample time for a normal person to reflect and arrive at a cold, deliberate and premeditated conclusion, and that he had done this to the full extent of which he was capable. However, "the controlling issue as to degree depends not alone on the character of the killing but also on the quantum of personal turpitude of the actor." It reduced the judgment to murder in the second degree.

On several occasions individual members of the court have been highly critical of the attempted distinction between first and second degree murder. For example, in a concurring opinion in *People v. Valentine*, 28 Cal. 2d 121, 169 P.2d 1 (1946), Justice Spence stated that it is practically impossible to instruct on the distinction.

He suggested that much of the present complications and confusion could be eliminated if degrees of murder were abolished.

This has been done in the Model Penal Code and the new code in New York. Minnesota retains degrees. Illinois, both in its old and new code, has but one degree. The commentary of the Model Penal Code points out that some of the worst murders are clearly intentional and unaccompanied by mitigating circumstances, yet there is no proof of premeditation. On the other hand, there are many clearly premeditated murders where mitigation may be justified, as in the case of mercy killings, infanticides, or suicide pacts where one participant survives. The Royal Commission on Capital Punishment made extensive efforts to grade murders and concluded that the quest was "chimerical." Report 1949-1953 (Cmd. 8932), 189.

Of course, abolition of degrees of murder does not necessarily mean that all of the aggravating factors of our present first degree murder statute need be disregarded. Deliberation and premeditation, use of poison, torture, lying in wait, or presence of an accompanying felony might still be made aggravating factors for the purposes of determining sentence.

State of mind; intention or knowledge. It is clear that intentionally or knowingly committed homicides, unless mitigated to manslaughter or found justifiable, should be murder, as under existing law.

State of mind; recklessness manifesting extreme indifference. Under the present Penal Code, reckless homicides, at least where there is "malice," fall within the definition of second degree murder unless circumstances are present which make them first degree murder (*i.e.*, listed felonies, poison, lying in wait, torture). In *People v. Phillips*, 64 Cal. 2d 574, 51 Cal. Rptr. 225, 414 P.2d 353 (1966), the court stated that a killing is second degree murder if it proximately results from an act, the natural consequences of which are dangerous to life, and which is deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard of life. In the same opinion the court suggests that the line between murder and manslaughter depends primarily upon whether a subjective or objective test is applied. Thus, if the defendant in that case gen-

uinely, although unreasonably, believed that he was not endangering the life of the victim, he could only be convicted of manslaughter.

The proposal would draw the line in a different manner. It would discard the terms "malice" and "malice aforethought," and treat a reckless homicide as manslaughter, unless there are circumstances manifesting extreme indifference to life, in which case the homicide would be murder. Negligent homicide would be a new offense. This is not as drastic a change as it first seems, as is shown by the sentencing provisions. Under the present Penal Code the sentence for second degree murder is five years to life, and for manslaughter a maximum of fifteen years. Under the proposal the sentence structure follows:

Murder	7 years to life imprisonment or death
Manslaughter	6 months to 10 years
Negligent homicide	6 months to 5 years

The draft also proposes a completely new approach to the felony-murder problem. A homicide occurring in the course of the commission of specified felonies will be murder if committed intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the defendant did a dangerous act, which caused death, in the commission of, or an attempt to commit, or flight after committing or attempting to commit the offense. The dangerous act may be the felony itself (*e.g.*, arson of occupied dwelling), or it may be a separate act (as where the rapist chloroforms his victim or beats her into unconsciousness).

The felony-murder doctrine is impossible to defend on principle when applied to homicides committed accidentally or negligently. The arguments against it are too well known to need repeating here. See, *Model Penal Code*, commentary and authorities cited, *Tentative Draft No. 9*, pp. 37-39 (1959).

In its broadest statement the felony-murder doctrine made it murder to commit any homicide, even accidentally, during the commission of any felony. All American jurisdictions retain the doctrine in some form. The New York proposal to limit its application to acts "inherently dangerous to human life" (*Proposed New York Penal Law*

Section 130.25) was rejected by the legislature. *New York Penal Law Section 125.25, subd. 3.*

The California law is based on the common law with the Pennsylvania modification, although recently it has been reconsidered and clarified by judicial decisions. *Penal Code Section 189*, quoted earlier, provides that murders committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or a lewd act upon a child under fourteen shall be first degree murder. By judicial decision the homicidal act can even be negligently or accidentally committed, and strict causation between the felony and the homicide is not required. If the defendant intended to commit one of the named felonies and killed while committing it, he is guilty of first degree murder. See, *People v. Washington*, 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P. 2d 130 (1965); *People v. Whitehorn*, 60 Cal. 2d 256, 32 Cal. Rptr. 199, 383 P. 2d 783 (1963).

The draft formulation does away with all vestiges of the common law felony-murder doctrine except in the case of the specified felonies of armed robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, aggravated kidnapping or felonious escape. The list of felonies is tentative. This does not mean that murder convictions may not occur in cases involving the commission of other felonies. It merely means that the statutory presumption will not arise. Thus, the trier of fact might well find recklessness manifesting extreme indifference to the value of human life in such cases as *People v. Pulley*, 225 Cal. App. 2d 366, 37 Cal. Rptr. 376 (1964) (defendant, being pursued at high speed while driving a motor vehicle without owner's consent, ran red light at crowded intersection, killing a man); *People v. Phillips*, 64 Cal. 2d 574, 51 Cal. Rptr. 225, 414 P.2d 353 (1966) (chiropractor falsely represented he could cure cancer without surgery causing parents to remove child from hospital; child died).

Under existing California law, where the felony is not one of the listed felonies, the homicide will be second degree murder if the felony is inherently dangerous to life. In determining whether the felony is inherently dangerous to life it is necessary to look at the elements of the felony in the abstract, not at the particular facts of the case. *People v. Williams*, 63 Cal. 2d 452, 47 Cal. Rptr. 7,

406 P.2d 647 (1965). There is a growing body of decisional law listing felonies which are or are not inherently dangerous to life. Thus, administration of narcotics to a minor, abortion, kidnapping, and possession of a concealed weapon by an ex-felon are held to be inherently dangerous to life. Grand theft, driving a motor vehicle without the owner's consent, and conspiring to possess methedrine are not. *People v. Phillips*, supra; *People v. Williams*, supra; *People v. Ford*, 60 Cal. 2d 772, 36 Cal. Rptr. 620, 388 P.2d 892 (1964).

People v. Phillips is illustrative of the operation of the California second degree felony-murder doctrine. The jury could have found that the defendant, a chiropractor, upon the false representation that he could cure a child of cancer without surgery, caused her parents to remove her from a hospital. As a result she was deprived of surgery and died. One prosecution contention was that this was second degree felony-murder, i.e., murder in the course of the commission of grand theft. The Supreme Court held that grand theft, looked at in the abstract, is not a felony inherently dangerous to life, and the conviction could not stand. Of course upon a new trial a murder conviction still might be obtained on the theory that the defendant's recklessness supplied the required malice for murder.

The proposed presumption of recklessness and indifference should be compared with *Model Penal Code Section 210.2(b)* set forth in an Appendix. The Model Penal Code also provides for a presumption of recklessness and indifference where the homicide is committed in the course of certain specified felonies. It is felt that the draft section is preferable to the Model Penal Code in that it focuses on dangerous acts as well as dangerous felonies.

The presumption is one affecting the burden of producing evidence. See *California Evidence Code Sections 603, 604*. If the evidence establishes beyond a reasonable doubt that the defendant committed a dangerous act from which death resulted in the furtherance of one of the named felonies, the burden of producing controverting evidence will shift to him to raise a reasonable doubt. Cf. *Penal Code Section 484(b) and (c)*; CALJIC 261-A (1967 Revision.) Suppose that A shot and killed a storeowner during a robbery. B, charged as an accomplice, might

testify that it was understood between him and A that the gun would not be loaded. B, if believed, could be said to have raised a reasonable doubt as to the act and rebutted the presumption.

Under the existing Penal Code murders by torture, poison or lying in wait are first degree murders. Although intent to kill is not required, there must be something akin to recklessness. Thus, murder by torture requires an intent to cause cruel suffering for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity. *People v. Anderson*, 63 Cal. 2d 351, 46 Cal. Rptr. 763, 406 P. 2d 43 (1965). Murder by lying in wait requires an intent to commit acts likely to cause death and which show a conscious disregard for human life. *People v. Thomas*, 41 Cal. 2d 470, 261 P. 2d 1 (1953) (concurring opinion). Murder by poison by its very nature involves at least recklessness. These forms of homicide would be within the purview of murder in the proposal.

Sentence. The draft follows the general sentencing section, Section 205, and provides for murder, a minimum term of seven years and a maximum of life imprisonment, with death as a bracketed alternative. Under the present Penal Code, the sentence for first degree murder is death or life imprisonment with possibility of parole in seven or nine years depending upon the defendant's prior criminal record. The penalty for second degree murder is five years to life, also with parole possibilities. The exact effect of life imprisonment under the proposal is considered in connection with the sentencing part of the code.

[Section 1416. Sentence of Death for Murder; Further Proceedings to Determine Sentence

(1) When a defendant is found guilty of murder, the court shall impose a sentence of imprisonment for the term prescribed by Section 205(1) if the defendant was under the age of eighteen at the time of the commission of the crime, or if the murder did not fall into one or more of the categories listed in Subsection (2) of this section. In any case, the court in its sole discretion may sentence the defendant to imprisonment if it feels that the death sentence is inappropriate.

(2) Death penalty. The death penalty may be imposed only if the murder falls into one or more of the following categories:

(a) murder of a peace officer acting in the performance of his duties or a person assisting a peace officer so acting; or

(b) murder by a convict while incarcerated under sentence of imprisonment for murder, or whose term for a felony in the first degree has been fixed at life imprisonment by the Adult Parole Authority; or

(c) murder for compensation or promised compensation.

(3) Determination by Court or by Court and Jury.

(a) Unless the court imposes life imprisonment under Subsection (1) of this section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced to life imprisonment or death. The proceeding shall be conducted before a jury unless the prosecuting attorney and the defendant, with the approval of the court, waive a jury. If there has been a jury trial on the issue of guilt, it shall be conducted before the court sitting with that jury or, if the court for good cause shown discharges that jury, with a new jury empaneled for the separate proceeding. Otherwise, it shall be conducted with a jury empaneled for that purpose.

(b) In the proceeding, evidence may be presented by either party as to any matter relevant to sentence, including, but not limited to, the nature and circumstances of the crime, defendant's character, background, history, and mental and physical condition. Evidence concerning parole and pardon practices, policies and experience shall be inadmissible. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death. Such argument may include comment on the relevance of the death penalty as a deterrent of crime and the presence or absence of aggravating or mitigating factors. The court shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole or pardon, if the jury verdict is against sentence of death.

(c) After conclusion of the proceeding, the determination whether sentence of death shall be imposed shall be

in the discretion of the court. When the proceeding is conducted before the court sitting with a jury, the court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to agree upon a unanimous verdict, the court shall impose a sentence of life imprisonment.]

COMMENT

Section 1416. Sentence to Death for Murder; Further Proceedings to Determine Sentence

This section is placed in brackets until it is determined whether a recommendation will be made on the matter of the death penalty.

It is proposed that if the death sentence is to be retained, the penalty proceeding in death penalty cases should also be retained. This procedure, in use in California since 1957, has resulted in much litigation. This litigation was partly the result of failure to spell out procedural and evidentiary rules in the statute, and difficulties over the extent of instruction and argument to the jury on the exercise of its discretion. Some of the gaps in the statute have been filled by judicial decisions. The draft proposes to remedy others.

If the jury is to exercise the sentencing discretion it must be supplied with sufficient information to exercise that discretion. At a bare minimum it should know whether or not the defendant has a record of repetitive criminal conduct of a serious sort. If evidence of a record is admissible in his trial on the issue of guilt, it may be seriously prejudicial. This is the main rationale for a separate trial on the matter of sentence as is now in use in California. If the jury is intelligently to decide the matter it needs much more than the criminal record. It should generally have before it the same evidence and information which a judge has in exercising his sentencing function.

Court or jury as agency exercising discretion. Section 1416 is drafted on the assumption that the death sentence is to be retained, and that it will be a discretionary penalty. The question immediately arises as to what agency shall exercise the discretion. Under *Penal Code Section 190.1* the discretion is in the trier of fact. However, if the de-

fendant pleads guilty, the discretion is in a jury unless the jury is waived. Since there seems to be no serious proposal for placing the discretion in an administrative agency, the problem is treated here as one of apportioning the discretion between judge and jury, and working out the procedural details if there is a guilty plea or waiver of jury.

The arguments for and against jury discretion are well known and need brief mention. See, *e.g.*, *Model Penal Code, Tentative Draft No. 9*, pp. 73-74 (1959). The main argument for jury discretion is that the death penalty should be a community sanction. It is also said that jury discretion is necessary to minimize jury nullification and, further, that many judges are reluctant to assume the responsibility of sentencing a person to death. The opposing arguments are more numerous. Judges are experts and less apt than juries to rely on emotion and prejudice. Their decisions will perhaps be more uniform. The jury as currently constituted is said to be not representative of the community because of statutory exclusions from jury service. The matter of placing before the jury the information it needs to exercise intelligently its discretion has caused numerous problems in California. This in itself is an argument for judicial discretion.

This draft is based on the premise that the arguments for jury discretion overbalance arguments to the contrary. The problem, it is felt, is one of balancing aggravating and mitigating factors, somewhat similar to the problem of drawing the line between murder and manslaughter. As Justice Frankfurter testified before the Royal Commission on Capital Punishment: "I do not understand the view that juries are not qualified to discriminate between situations calling for mitigated sentences." Quoted in *Model Penal Code, Tentative Draft No. 9*, p. 74 at n.7. At the same time it is felt that the judge should play a significant role, as provided in the Model Penal Code, both in preliminarily screening possible death sentence cases before submitting them to the jury and in reviewing the jury determination for the death penalty.

It is provided in Subsection 1416(1) that the court shall rule out the death penalty (and the separate proceeding to determine sentence to be discussed below) where the defendant was under eighteen at the time of the crime (present law under *Penal Code Section 190.1*), or where

the homicide did not fall within certain limited categories of homicides listed in Subsection 1416(2). This is a frank attempt to limit the death penalty primarily to those types of murders where the death sentence is being imposed under existing law. If this approach is adopted there may be other types of murders which should be added to the list, for example, very brutal rape or child murders. The word "peace officer" as used in the section must be broadly defined, for example, to include a prison warden or guard or a probation officer.

Under Section 1416(2)(b) the death sentence may be imposed in the case of a murder by a convict serving a sentence of imprisonment for murder. However, it can be imposed under this subsection upon a convict serving a term for a felony of the first degree only for a murder committed after his term has been fixed at life imprisonment by the Adult Parole Authority. The term "incarcerated" as used here is intended to include persons being transported but not those on parole.

The term "murder for compensation" is intended to include people who hire others or are hired to commit homicides. See, e.g., *People v. Duncan*, 51 Cal. 2d 523, 334 P.2d 858 (1959); *People v. Baldonado*, 53 Cal. 2d 824, 3 Cal. Rptr. 363, 350 P.2d 115 (1960); *People v. Moya*, 53 Cal. 2d 819, 3 Cal. Rptr. 360, 350 P.2d 112 (1960). It is not intended to include robbery-murders.

Even if the court submits the death penalty question to the jury, under Subsection 1416(3) it still would have the discretion after the jury makes a death penalty decision to substitute life imprisonment. Thus, capital punishment, in all cases where there is a jury, must rest upon the concurrent judgment of court and jury. This is also the result under the new *Illinois Criminal Code*, Section 9-1(b).

Evidence. The problems which arose before *People v. Morse*, 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33 (1964), where all manner of evidence concerning the practical effects of a life sentence was introduced, must be avoided. This is expressly stated in the draft in Section 1416(3)(b).

Argument and instructions. Some of the litigation which arose out of the operation of *Penal Code Section 190.1* involved the scope of argument and instructions to

the jury. It is proposed that the scope of argument be broad. Thus, the prosecutor should be permitted to argue that there is no evidence of mitigating circumstances. Contra, *People v. Friend*, 47 Cal. 2d 749, 306 P.2d 463 (1957). Furthermore, he and the defense counsel should be permitted to argue the deterrent effect of the death penalty. Contra, *People v. Love*, 56 Cal. 2d 720, 16 Cal. Rptr. 777, 17 Cal. Rptr. 481, 366 P.2d 33, 809 (1961); *People v. Ketchel*, 59 Cal. 2d 503, 30 Cal. Rptr. 538, 381 P.2d 394 (1963). The court should be permitted to comment on such matters. In that connection the prosecutor, within the limits of an appropriate instruction on the possibility of parole or pardon, should be able to argue that the death penalty would place the defendant beyond such possibility. Cf. *People v. Morse*, *supra*. These considerations are certainly in the mind of a court in sentencing and there is no reason why the jury should not also be made aware of them if it is not already. The instruction in *Morse* certainly does not prevent such awareness.

Effect of jury disagreement or appellate reversal. Under *Penal Code Section 190.1*, if there is a jury disagreement as to penalty the court may impose life imprisonment or empanel a new jury for sentencing purposes. If there is a reversal of the penalty proceedings, seemingly the trial court has the same alternatives. *People v. Moore*, 53 Cal. 2d 451, 2 Cal. Rptr. 6, 348 P.2d 584 (1960). Under the proposal where there is jury disagreement the court could not impose a death sentence. If the jury made up of twelve representative people cannot agree, this should weigh the balance in favor of life imprisonment. Under the procedure as outlined in the proposal, death penalty reversals should be rare.

NOTE: Although Section 1416 is included in the homicide chapter, it may eventually be moved to the sentencing article.

Section 1420. Manslaughter

- (1) Criminal homicide constitutes manslaughter when:
 - (a) it is committed recklessly; or
 - (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of

such explanation or excuse shall be determined from the viewpoint of a reasonable person in the defendant's situation under the circumstance as he believes them to be.

(2) Manslaughter is a felony of the second degree.

COMMENT

Section 1420. Manslaughter

State of mind; recklessness. It is proposed in the draft to define manslaughter in a somewhat different manner than in the present code. One state of mind is recklessness. The other, a modification of the existing provocation doctrine, will be discussed below.

It is proposed to denominate as manslaughter those criminal homicides committed recklessly which do not fall within the definition of murder, in other words, where the trier of fact does not find recklessness manifesting extreme indifference to life. This is perhaps a departure from existing California law which, aside from vehicle homicides, seems to allow conviction only where the homicide is committed with criminal negligence. However, there are also convictions of involuntary manslaughter under the existing code where although the jury could make a finding of recklessness, it could make no finding of malice. See, discussion in *People v. Conley*, 64 Cal. 2d 310, 49 Cal. Rptr. 815, 411 P.2d 911 (1966); *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

State of mind; extreme mental or emotional disturbance. The other type of manslaughter proposed in the draft is a homicide, which would otherwise be murder, committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. This represents an expansion of the current provocation doctrine. Under existing California law a homicide is voluntary manslaughter if committed "upon a sudden quarrel or heat of passion." *Penal Code Section 192, subd. 1*. The quoted words have been construed in many reported cases. However, the provocation at least until recently had to be such as would arouse an ordinarily reasonable person of average disposition, and it must of course have actually aroused

the defendant. In *People v. Valentine*, 28 Cal. 2d 121, 169 P.2d 1 (1946), the court rejected the common law doctrine that words alone are not enough to arouse the ordinarily reasonable person. The jury must say whether the facts and circumstances lead them to believe that the homicide was committed under a heat of passion. However, the court retained the objective test of passion. There are also a number of decisions discussing the problem of cooling time, the duration of which is tested by the standard of the average or ordinarily reasonable person. See, CALJIC Instruction No. 311-311C and decisions cited.

More recently the judicial decisions seem to be moving toward a subjective approach, based on the requirement of malice for murder. See, *People v. Gorshen*, *supra*; *People v. Conley*, *supra*. In the latter decision, the Supreme Court read *Gorshen* as overruling earlier cases "that held that the question whether the defendant was guilty of murder or manslaughter is to be decided solely on the basis of the reasonable man objective standard of provocation." Thus, his state of intoxication could be considered.

The *Conley* decision would seem to open the way for reconsideration of the provocation doctrine and is not inconsistent with the present proposal. The draft departs from the rigid limitations of the common law provocation doctrine by allowing attention to the special situation of the defendant. His temperament, any infirmities of body or mind, or his state of intoxication will be material. The explanation or excuse must be reasonable. Reasonableness will be determined from the viewpoint of a person in his situation. In the end the question will be, and the jury should be asked, whether his loss of self-control arouses sympathy enough to call for mitigation of his offense to manslaughter. Thus, assuming a murder charge in a euthanasia or infanticide case, the defendant would usually be entitled to a manslaughter instruction. Cf. *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920), where defendant, at the request of his wife, a terminal multiple sclerosis victim, placed arsenic within her reach. She committed suicide and he was convicted of first degree murder.

The subsection is based on *Model Penal Code Section 210.3(1)(b)* which is set forth in the Appendix. The commentary to that section (*Model Penal Code Tentative Draft No. 9*, p. 48) which well states the purpose of the subsection, follows:

“Though it is difficult to state a middle ground between a standard which ignores all individual peculiarities and one which makes emotional distress decisive regardless of the nature of its cause, we think that such a statement is essential. For surely if the actor had just suffered a traumatic injury, if he were blind or were distraught with grief, if he were experiencing an unanticipated reaction to a therapeutic drug, it would be deemed atrocious to appraise his crime for purposes of sentence without reference to any of these matters. They are material because they bear upon the inference as to the actor’s character that it is fair to draw upon the basis of his act. So too in such a situation as *Gounagias, supra*, where lapse of time increased rather than diminished the extent of the outrage perpetuated on the actor, as he became aware that his disgrace was known, it was shocking in our view to hold this vital fact to be irrelevant.

“We submit that the formulation in the draft affords sufficient flexibility to differentiate between those special factors in the actor’s situation which should be deemed material for purposes of sentence and those which properly should be ignored. We say that there must be a ‘reasonable explanation or excuse’ for the extreme disturbance of the actor; and that the reasonableness of any explanation or excuse ‘shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.’ There will be room, of course, for interpretation of the breadth of meaning carried by the word ‘situation’, precisely the room needed in our view. There will be room for argument as to the reasonableness of the explanations or excuses offered; we think again that argument is needed in these terms. The question in the end will be whether the actor’s loss of self-control can be understood in terms that

arouse sympathy enough to call for mitigation in the sentence. That seems to us the issue to be faced."

Sentence. Manslaughter under the proposal will be a second degree felony, thus having a maximum sentence of ten years imprisonment. Under the existing statute the maximum is fifteen years.

Section 1425. Negligent Homicide

(1) Criminal homicide constitutes negligent homicide when it is committed by criminal negligence.

(2) Negligent homicide is a felony of the third degree.

COMMENT

Section 1425. Negligent Homicide

This section relates to two types of offenses which are denominated manslaughter in the present code. The first is involuntary manslaughter, the second, manslaughter in the driving of a motor vehicle.

Penal Code Section 192, subd. 2, on its face seems to allow conviction for involuntary manslaughter where there is a homicide in the commission of an unlawful act, not amounting to a felony (the common law misdemeanor-manslaughter doctrine). However, the statute has been construed to require something more. The unlawful act must be committed intentionally or with criminal negligence and must be dangerous to human life or safety. Furthermore, the defendant must know or reasonably be expected to know of the danger. *People v. Stuart*, 47 Cal. 2d 167, 302 P. 2d 5 (1956). *Penal Code Section 192, subd. 2*, also provides for another variety of involuntary manslaughter, "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." This portion of the section has been construed in *People v. Penny*, 44 Cal. 2d 861, 285 P. 2d 926 (1955), to require more than negligence. What more is required is not too clear. However, it must appear that the fatal consequences of the negligent act could reasonably have been foreseen and that the negligence is "aggravated, culpable, gross, or reckless." In the only reported case since *Penny*, the defendant mother had left four children alone in her house which caught on fire, one child dying as a result of burns. A conviction of in-

voluntary manslaughter was reversed since there was no evidence that the fire was reasonably foreseeable. *People v. Rodriguez*, 186 Cal. App. 2d 433, 8 Cal. Rptr. 863 (1960).

Motor vehicle manslaughter is now of two types: with gross negligence, a felony-misdemeanor with a maximum sentence of five years, and without gross negligence, a misdemeanor. Manslaughter with gross negligence is treated as a misdemeanor if the jury so recommends. Gross negligence was defined in *People v. Costa*, 40 Cal. 2d 160, 252 P. 2d 1 (1953), as "an entire failure to exercise care and a conscious indifference to consequences."

It would appear that both involuntary manslaughter and motor vehicle manslaughter (aside from the misdemeanor category), as defined by the case law, are comparable to the proposed definition of negligence as defined in Section 404 of the present draft. Under that definition, as imparted into negligent homicide, proof would be required that the defendant should have been aware of a substantial and unjustifiable risk that his conduct would cause death, and that his failure to be aware of the risk constituted a gross deviation from the standard of care exercised by a reasonable person.

The draft rejects the notion that a motor vehicle homicide committed without gross negligence should be a criminal homicide, at least under the Penal Code. This does not mean that there is no criminal liability in these cases. The actor can be convicted of reckless driving or some other motor vehicle violation which would ordinarily be a misdemeanor, as is motor vehicle manslaughter without gross negligence under the present statute. We think, however, at this point, that it might be advisable to place most vehicle homicides in the Vehicle Code. If there is to be a vehicular homicide without criminal negligence as defined here, it should be in the Vehicle Code, carefully defined to be a lesser included offense of the Vehicle Code criminally negligent homicide. Of course the possibility of murder by motor vehicle remains and would be covered by the Penal Code.

The maximum sentence for a third degree felony, which is five years imprisonment, would appear to be adequate for negligent homicides. Although involuntary manslaughter has a maximum sentence of fifteen years, the

infrequent cases usually involve something like a shooting or hunting accident, or abuse of a child. The maximum for motor vehicle homicides is five years under the existing code.

NOTE: causing or aiding suicide. *Penal Code Section 401* makes it a felony to deliberately aid, advise or encourage another to commit suicide. The Model Penal Code also contains a provision making it an offense to cause or aid suicide. *Model Penal Code Section 210.5*. It is proposed that this be treated as a causation problem. Thus, a person who causes or aids a suicide may be guilty of a culpable homicide, some other offense such as reckless conduct or of no offense at all.

NOTE: "year and a day" rule. The "year and a day" rule, *Penal Code Section 194*, will be treated as a matter of causation.

NOTE: The problem of when a person will be held responsible for murder of an accomplice killed by a peace officer, etc. will be treated as a matter of causation, as will the rare problem of murder by perjury. *Penal Code Section 128*.

APPENDIX

MODEL PENAL CODE

Proposed Official Draft

ARTICLE 210. CRIMINAL HOMICIDE

Section 210.1. Criminal Homicide.

(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.

(2) Criminal homicide is murder, manslaughter or negligent homicide.

Section 210.2. Murder.

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

(2) Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in Section 210.6].

Section 210.3. Manslaughter.

(1) Criminal homicide constitutes manslaughter when:

(a) it is committed recklessly; or

(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the

viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

(2) Manslaughter is a felony of the second degree.

Section 210.4. Negligent Homicide.

(1) Criminal homicide constitutes negligent homicide when it is committed negligently.

(2) Negligent homicide is a felony of the third degree.

Section 210.5. Causing or Aiding Suicide.

(1) *Causing Suicide as Criminal Homicide.* A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception.

(2) *Aiding or Soliciting Suicide as an Independent Offense.* A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.

Section 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

(1) **Death Sentence Excluded.** When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

(2) Determination by Court or by Court and Jury.

Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empanelled for the purpose.

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut any hearsay statements. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggra-

vating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the issue is submitted to the jury, the Court shall so instruct and also shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

Alternative formulation of Subsection (2) :

(2) **Determination by Court.** Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. In the proceeding, the Court, in accordance with Section 7.07, shall consider the report of the pre-sentence investigation and, if a psychiatric examination has been ordered, the report of such examination. In addition, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut any hearsay statements. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court. In exercising such discretion, the Court shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

(3) Aggravating Circumstances.

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) Mitigating Circumstances.

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.

CALIFORNIA JURY INSTRUCTIONS— CRIMINAL

Instruction No. 303.

All murder which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.

To constitute this kind and degree of homicide the killing must be accompanied by a clear, deliberate intent to take life. The intent to kill must be the result of deliberation and must have been formed upon a pre-existing reflection and not under a heat of passion or other condition such as precludes the idea of deliberation.

The law does not require that such deliberation shall exist for any particular period of time or that any prescribed period of time shall elapse between the formation of the intent to kill and the act of killing. It is necessary only that the act of killing be preceded by, and be the result of a concurrence of will, deliberation and premeditation on the part of the slayer to constitute murder in the first degree, regardless of how rapidly or slowly these mental processes succeed each other or how quickly or tardily they are followed by the act of killing.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decide to and commit the unlawful act causing death.

Chapter 3. Security of Person

Introduction

The present California Penal Code contains a large number of offenses dealing with assault-type conduct, specifying, with varying punishments, a wide range of prohibited conduct. In general, the effort of the more modern codes has been to consolidate these offenses into a coherent scheme with a penalty structure which is both internally consistent and also is in line with the penalties provided for other offenses. This proposed draft, which is largely based upon Article 211 of the Proposed Official Draft of the Model Penal Code (a copy of which is attached as an Appendix), attempts to achieve these same objectives. The consequences are that a significant number of specific crimes has been eliminated and that more generalized types of conduct have been proscribed. Correspondingly, several new crimes have been created, and the varying punishments for the existing assault-type offenses have been made uniform.

Specifically, the following major changes are proposed:

- (a) consolidation of the assault and battery offenses;

- (b) inclusion of "placing in fear" as a form of assault;

- (c) elimination of the offenses of "assault with intent to. . .";

- (d) creation of a general "reckless conduct" offense;

- (e) special treatment of the use of deadly weapons;

- (f) creation of a general "terroristic conduct" offense.

The principal factors upon which is based the grading structure set forth in the draft are: the actor's culpability, the seriousness of the injury inflicted or intended and the mode of the conduct. No assault offense has been classified as a first-degree felony; the classifications range from [petty] misdemeanor to second-degree felony.

Section 1500. Aggravated Assault

A person is guilty of aggravated assault if he either recklessly causes or attempts to cause:

(1) serious bodily injury to another in circumstances manifesting extreme indifference to the value of human life;

(2) serious bodily injury to another; or

(3) bodily injury to another with a deadly weapon.

Aggravated assault under Subsection (1) is a felony of the second degree; aggravated assault under Subsection (2) or (3) is a felony of the third degree.

COMMENT**Section 1500. Aggravated Assault**

1. One form of aggravated assault which appears in the present Penal Code is "assault with intent to . . ."¹ Inasmuch as an assault with intent to commit another offense will, in every case, constitute an attempt to commit that offense, this category of offenses has been omitted from the Assault article. This is consistent with the modern codes and places the treatment of this type of conduct more rationally in the context of the principal offense.

2. Subsection (1) is the highest form of aggravated assault, a felony of the second degree. It requires that the injury inflicted or proposed be "serious bodily injury," as well as requiring that the culpability be at least "recklessly in circumstances manifesting extreme indifference to the value of human life." In short, the conduct must manifest extreme disregard for human safety.

This treatment also makes unnecessary the existing specification of offenses which depend upon the means used for the assault, as, for example, *Penal Code Section 244*—throwing acid with intent to disfigure or burn.

3. The draft does not treat separately as an aggravated offense assaults upon designated classes of persons, as, for example, assaults upon peace officers or firemen (*Penal Code Section 243*), government officials (*Penal Code Section 217.1*); or by particular classes of persons, e.g., prisoners (*Penal Code Sections 4500, 4501, 4501.5*). To the ex-

¹ E.g., *California Penal Code Section 217*, Assault with intent to commit murder; *California Penal Code Section 220*, Assault with intent to commit rape, etc.; *California Penal Code Section 221*, Assault with intent to commit other felonies.

tent that these are special problems, they will be treated in articles dealing with the appropriate institutions.

4. (a) Subsection (2) of Section 1500 specifies the first form of aggravated assault which is classified as a felony of the third degree. Subsection (2) requires a lower level of culpability, recklessly causing serious bodily injury, than Subsection (1), which requires "circumstances manifesting extreme indifference to the value of human life."

(b) The present Penal Code treats the use of deadly or dangerous weapons specially in several different ways. *Penal Code Sections 12000-12560*—The Dangerous Weapons' Control Law—is a comprehensive regulatory statute. Section 245 makes assault with a deadly weapon an aggravated offense with a maximum of ten years' imprisonment; *Section 246* makes it a felony to "maliciously and wilfully discharge a firearm at an inhabited dwelling house or occupied building"; and *Section 417* makes it a misdemeanor to "threaten" another with a firearm, whether loaded or unloaded.²

Subsection (3) of Section 1500 makes a simple assault, *i.e.*, causing or attempting to cause bodily injury, an aggravated assault where a deadly weapon is used, with the corresponding classification of felony of the third degree. Sections 1510(2) and 1520(2) establish other types of the use of deadly weapons as a misdemeanor.

Section 1510. Assault

A person is guilty of assault if he:

(1) either recklessly causes or attempts to cause bodily injury to another;

(2) recklessly uses a deadly weapon in such a manner as to place another in danger of bodily injury; or

(3) by physical menace intentionally puts or attempts to put another in fear of imminent bodily injury.

Assault is a misdemeanor [unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor].

² See also, *California Penal Code Section 216*, Attempt to kill by poison; *California Penal Code Sections 4500, 4501, 4501.5, 4502*, Assault by prisoners.

COMMENT

Section 1510. Assault

1. Present California law distinguishes between assault, *Penal Code Section 240*, and battery, *Penal Code Section 242*, with respect to both definition and penalty (see *Penal Code Sections 241, 243*). In line with the approach that an attempt to commit a crime should generally be treated, for punishment purposes, in the same manner as a committed offense, the proposed definition of assault includes both types of conduct.

2. Present California law, *Penal Code Section 240*, requires a "present ability" for an assault. There is no specific inclusion of this element here, as the general attempt provisions will be controlling on this issue.

3. The draft specifically provides that an assault can be committed recklessly, a lower level of culpability than the existing statutory language of "attempt to commit," *Penal Code Section 240*, or "wilful and unlawful" infliction of injury, *Penal Code Section 242*. California decisions are equivocal on the issue of the required culpability,³ and the draft probably represents the existing state of the law.

4. Subsection 1510(2) is another instance of the special treatment of the use of deadly weapons. It is addressed to the reckless use of such implements, where, perhaps fortuitously, no injury was in fact caused and, by definition, none was attempted. Nevertheless the possibility of injury is so substantial in these circumstances as to warrant the imposition of at least the misdemeanor punishment.

5. Subsection (3) of Section 1510 provides that an attempt to put another in fear of imminent serious bodily harm constitutes the offense of assault. New to California,⁴ this provision puts the proposed code in line

³ See, e.g., *People v. Carmen*, 36 Cal. 2d 768, 228 Pac. 2nd 281 (1951); *People v. McCoy*, 25 Cal. 2d 177, 153 Pac. 2nd 315 (1944); *People v. Corson*, 221 Cal. App. 2d 579, 34 Cal. Rptr. 584 (1963); *People v. Peak*, 66 Cal. App. 2d 894, 153 Pac. 2nd 464 (1944); *People v. Alexander*, 41 Cal. App. 2d 275, 106 Pac. 2nd 916 (1940); *People v. Vasquez*, 85 Cal. App. 575, 259 Pac. 1005 (1927); *People v. Mendez*, 67 Cal. App. 724, 228 Pac. 349 (1924).

⁴ Compare the tort concept of assault discussed in *Lowry v. Standard Oil Co.*, 63 Cal. App. 2d 1 (1944), with the criminal concept limited in *People v. Sylva*, 143 Cal. 62 (1904).

with other modern codes,⁵ which have treated this type of conduct as warranting criminal sanction.

6. Assault is classified as a misdemeanor and as such provides a penalty (maximum of one year) that is greater than that provided in the present Penal Code (assault—six months and \$500, *Penal Code Section 241*; battery—six months and \$1,000, *Penal Code Section 243*). This increase in possible penalty is required by the general effort to reduce the categories of offenses, and does not seem excessive. The “scuffle or fight” type of assault is tentatively classified as a petty misdemeanor, thus making no substantial change, in this regard, from the existing Penal Code.

Section 1520. Reckless Conduct

A person is guilty of reckless conduct if he:

(1) recklessly engages in conduct which unjustifiably places or may place another in danger of death or serious bodily injury;

(2) intentionally points a firearm at or in the direction of another, whether or not the defendant believes it to be loaded.

Reckless conduct is a misdemeanor.

COMMENT

Section 1520. Reckless Conduct

The present Penal Code contains a number of provisions punishing conduct which, though fortuitously not resulting in injury, is reckless with respect to the creation of danger to life.⁶ No persuasive reason appears why this type of reckless conduct should not be generalized into one provision—Reckless Conduct. See also Section 1510(2). This is the pattern adopted by the majority of the other modern penal codes.⁷

⁵ See Illinois, 38 Ill. Rev. Stats. 12-1; Louisiana, 9 La. Rev. Stats. Ann. Section 14:36; Minnesota, 40 Minn. Stats. Ann. Section 609.22(1); Model Penal Code, Proposed Official Draft, Section 211.1(c); New York and Wisconsin have not included placing in fear of bodily harm as a form of criminal assault.

⁶ See e.g., California Penal Code Section 370, Public nuisances; California Penal Code Section 402(b), Abandoning refrigerators; California Vehicle Code Section 23104, Reckless driving.

⁷ Model Penal Code, Proposed Official Draft, Section 211.2; Illinois, 38 Ill. Rev. Stats. 12-5; New York Revised Penal Law, Sections 120.20, 120.25; Wisconsin, Wisc. Stats. Ann. Section 941.30.

Subsection (2) makes it a misdemeanor to point a fire-arm in the direction of another, regardless whether the actor believes it to be loaded. Subsection (2) differs from the treatment of the Model Penal Code, which makes the pointing of a firearm merely a presumption of recklessness and danger. *Model Penal Code, Section 211.2*. According to the commentary to the Model Penal Code, see *Proposed Official Draft*, p. 136, the presumption was thought necessary to provide exculpation, for example, for "the pointing of an unloaded gun at another in the course of a drama." Subsection (2) is not intended to prohibit the use of pseudo weapons, like those used in theatrical performances; accordingly, there is no need to treat the issue by the use of presumptions.

[Section 1530. Terroristic Conduct

A person is guilty of terroristic conduct if he threatens to commit any crime of violence with purpose to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such inconvenience.

Terroristic conduct is a felony of the third degree.]

COMMENT

Section 1530. Terroristic Conduct

The present California Penal Code does not appear to have a provision similar to proposed Section 1530, Terroristic Conduct. The proposed section, modeled after the *Model Penal Code Section 211.3*, is directed toward the limited type of threat to commit a crime of violence for the purpose of causing serious public inconvenience, for example, a threat to explode a bomb. This type of conduct seems serious enough in its consequences of public alarm and possible injury to warrant the classification of felony of the third degree.

Section 1530 is not intended to cover conduct which more properly comes within the category of disorderly conduct (*cf. Model Penal Code, Section 250.2*, or false public alarms, *id. Section 250.3*). Rather it is directed at the actor's own threat which is intended to cause the prohibited consequences.

The proposed section also differs from the Model Penal Code in that it does not include threats made to terrorize another. This type of conduct would seem to be adequately covered by the "put another in fear" type of assault defined in Section 1510(2), by provisions dealing with disorderly conduct, or by the proposed text of Section 1530 itself.

Section 1530 is placed in brackets at this time because it is a special instance of a type of conduct for which more general provisions to be contained in other articles may be sufficient.

APPENDIX

MODEL PENAL CODE

Proposed Official Draft

ARTICLE 210. CRIMINAL HOMICIDE

Section 210.0. Definitions.

In Articles 210-213, unless a different meaning plainly is required:

(1) "human being" means a person who has been born and is alive;

(2) "bodily injury" means physical pain, illness or any impairment of physical condition;

(3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;

(4) "deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

ARTICLE 211. ASSAULT; RECKLESS ENDANGERING; THREATS

Section 211.0. Definitions.

In this Article, the definitions given in Section 210.0 apply unless a different meaning plainly is required.

Section 211.1. Assault.

(1) **Simple Assault.** A person is guilty of assault if he:

(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(b) negligently causes bodily injury to another with a deadly weapon; or

(c) attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

(2) **Aggravated Assault.** A person is guilty of aggravated assault if he:

(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or

(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.

Section 211.2. Recklessly Endangering Another Person.

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

Section 211.3. Terroristic Threats.

A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

DIVISION 11. CRIMES AGAINST SEXUAL MORALITY, PUBLIC DECENCY AND THE FAMILY

Chapter 4. Obscenity

Section 1750. Definitions.

The following definitions apply to this chapter:

(1) "Obscene." Any material or performance is obscene if considered as a whole in the light of contemporary standards its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion which goes substantially beyond customary limits of candor in description or representation of such matters and is utterly without redeeming social importance. The predominant appeal of material shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience, in which event it shall be judged with reference to such susceptible groups.

(2) "Material" means anything printed or written, or any picture, drawing, photograph, motion picture or pictorial representation, or any statute or other figure, or any recording or transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or may be used as a means of communication. "Material" includes undeveloped photographs, molds, printing plates and other latent representational objects.

(3) "Performance" means any play, motion picture, dance or other exhibition presented or performed in any public place.

(4) "Distribute" means to transfer possession of material whether with or without consideration.

COMMENT

Section 1750. Definitions

This section is substantially the same as existing *Penal Code Section 311(a)* except for the addition of a provi-

sion permitting a different interpretation of the evidence where material is designed for children or to a sexually deviant group. The "variable obscenity" concept appears in the Model Penal Code¹ as a rule of evidence.

"In any prosecution under this Section evidence shall be admissible to show:

(a) the character of the audience for which the material was designed or to which it was directed;

(b) what the predominant appeal of the material would be for ordinary adults or any special audience to which it was directed, and what effect, if any, it would probably have on conduct of such people;
 . . ."

In the opinion of Mr. Justice Brennan in *Mishkin v. New York*, 383 U.S. 502 (1966) this concept is stated in these words:

"Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth (Roth v. U.S.)*, 354 U.S. 476 (1957) test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."

The prevention of the dissemination of prurient material to children has been recognized as a legitimate concern of society (*Jacobellis v. Ohio*, 378 U.S. 184 (1964)). Parents have an understandable interest in shielding the young from knowledge of the coarser aspects of sex and from exposure to displays and descriptions of deviant behavior until they have been equipped at least with the standards of taste and discrimination in such matters which are expected of ordinary adults. In *Mishkin*, Mr. Justice Brennan added to children, specially susceptible groups such as sexual deviates. This "variable obscenity" concept has been the subject of comment and criticism.² But recognition of the need to protect children from obscenity continues to be recognized in decisional law.³

¹ Model Penal Code Section 251.4.

² Semonche, *Definitional and Contextual Obscenity: The Supreme Court's New and Disturbing Accommodation*, 13 UCLA Law Review 1173 (1966); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 Penn. Law Review 834 (1964).

³ *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721 (1966); *Interstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590 (1966).

Present California law does not reflect this "variable obscenity" concept. During the regular session of the California legislature in 1967 a bill was introduced which defined "harmful matter" and which proposed to prohibit its distribution to children. The definition of harmful matter was substantially the same as the definition of "obscene" in *Penal Code Section 311* except for the omission of the qualifier "utterly without redeeming social importance." The proposed statute did not win approval. The final draft of the proposed Michigan Criminal Code contains an obscenity classification of "lascivious material" which contains an explicitly descriptive catalog of the kinds of communications and pictures which may not be disseminated to minors. A similar section in the Michigan draft is concerned with the public display of "indecent material." The definition indicates that this proposed statute is directed against the exhibition of "dirty pictures."

The "variable obscenity" provision which is added to the existing law by proposed Section 1750(1) follows the Model Penal Code pattern. This has served as the model for the Illinois and New York revisions, it is consistent with controlling Supreme Court decisions and is intended to provide a more flexible application than statutes which endeavor to reach the problem in explicitly descriptive terms.

The remainder of the definitions in Section 1750 do not include definitions of "person" or of "knowingly" which appear in existing *Penal Code Section 311* because these are covered in the proposed drafts on complicity, liability of corporations and culpability. The word "performance" is included because obscene performances are dealt with in this chapter more comprehensively than in the existing law.⁴

The basic *scienter* provision of the proposed tentative draft on culpability appears in Section 404(2). (*Tentative Draft No. 1*, p. 9):

"A person acts knowingly, or with knowledge, with respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist. A person acts knowingly,

⁴ *Penal Code Section 311.6*: "Every person who knowingly sings or speaks any obscene song, ballad, or other words, in any public place is guilty of a misdemeanor."

or with knowledge, with respect to a result of his conduct when he is aware that his conduct is practically certain to cause the result.”

This is in accord with the “awareness of the nature of the material” standard enunciated in existing California decisional law. See: *People v. Pinkus*, 256 A.C.A. 175, 63 Cal. Rptr. 680 (App. Div. L.A. 1967).

Section 1751. Offenses

A person is guilty of a misdemeanor if he knowingly (or recklessly):

(1) Sends or brings any obscene material into this state for sale or distribution; or

(2) Prepares, publishes, prints, exhibits, distributes or offers to distribute any obscene material; or

(3) Possesses any obscene material with intent to distribute it in violation of this chapter; or

(4) Sells, advertises or disseminates material, whether or not obscene, by advertising, representing or suggesting that it is obscene; or

(5) Presents or directs an obscene performance or participates in that portion thereof which makes it obscene; or

(6) Distributes or sends to, or exhibits or offers to distribute any obscene material to a minor under the age of eighteen years; or

(7) Employs or uses a minor under the age of eighteen years to do or assist in doing any of the acts described in this section; or

(8) Performs an obscene act or otherwise presents an obscene exhibition of his body in a public place.

COMMENT

Section 1751. Offenses

The offenses defined in this section are drawn from existing law⁵ except for Subsection (8) which is suggested by *Illinois Criminal Code Section 11-20(4)*. The addition of this offense is offered for consideration as a means of reaching offensive conduct in the nature of an exhibition which may lie outside of the definition of an obscene performance.

⁵ *Penal Code Sections 311.2, 311.3, 311.4, 311.5 and 311.6.*

Section 1752. Obscene Material; Inducing Acceptance

A person is guilty of a misdemeanor if he knowingly:

(1) Requires or demands, as a condition to a sale, allocation, consignment or delivery for resale of any news paper, magazine, periodical, book, publication or other merchandise, that the purchaser or consignee receive any obscene material; or

(2) Denies or threatens to deny or revoke a franchise, or to impose any penalty, financial or otherwise, because of the failure or refusal of any person to accept obscene material.

COMMENT**Section 1752. Obscene Material; Inducing Acceptance**

This is a restatement of existing *Penal Code Section 311.7*.

Section 1753. Defenses

It is an affirmative defense in any prosecution under this chapter that dissemination or distribution of material:

(1) was not for compensation and was made privately and to personal associates other than children under eighteen years of age; or

(2) was to institutions or individuals having legitimate scientific or educational justification for possessing obscene material.

COMMENT**Section 1753. Defenses**

This adds to the existing law the exclusion of personal, non-commercial distribution among adults who have personal associations with each other. This is based upon a similar Model Penal Code provision and the Illinois Revised Code.

The section does not reach the conduct described in *United States v. Armijo*, 384 F.2d 694 (1967). In that case the defendant mailed four separate letters to four women, their parents, employers and others. Each letter was an extremely pornographic account of what the writer purported to have observed in connection with the women. The letters were clearly sent for the purpose of annoying and outraging the sensibilities of those con-

cerned. The court held that even though they might be regarded as private correspondence, they fell within the *Roth* definition of obscenity.

Rather than endeavoring to treat such conduct in Section 1753, it seems more desirable to draft a general statute covering any kind of offensive communication, whether in writing, by telephone or otherwise. (Offensive telephone communications are presently dealt with in *Penal Code Section 653(m)*.)

Section 1754. Destruction of Obscene Material

When the conviction of any person for the commission of any offense defined in this chapter becomes final, copies of any obscene material described in the accusatory pleading or admitted in evidence which were taken from the possession of the defendant and which are in the possession or under the control of the district attorney or any law enforcement officer or the clerk of the court may be destroyed upon order of the court. A copy of the order shall be mailed to the defendant and his counsel by the clerk of the court. The date fixed for the destruction of the obscene material must be at least thirty days after the mailing of the order.

COMMENT

Section 1754. Destruction of Obscene Material.

This is substantially the same as existing *Penal Code Section 312* with the addition of a proviso for notice to the defendant and the allowance of a 30-day period for the defendant's response, if any, to the notice.

Chapter 5. Prostitution

Introduction.

The regulation, control and institutionalization of prostitution can be traced back to the earliest beginnings of recorded history. The social influences brought to bear against it, until relatively recent times, consisted of moral concepts as these were expressed in custom, tradition, religion and, to a lesser extent, in law. These were weak and ineffective controls that were successful only in defining the outside boundaries of tolerated conditions in every urban center. It was not until the 18th century that the nations of western Europe became conscious of the relationship of prostitution to the spread of venereal disease and entered upon the employment of legal systems of regulation that reached their peak in 1867.¹ It was hoped that by the licensing of houses and persons and by requiring medical inspection reinforced by quarantine and treatment, prostitution as a menace to the public health could be minimized if not eliminated altogether. Typically, the legal structure within which regulatory systems existed tended to take the form of police regulation rather than formal statutory law.²

Regulated prostitution soon set its own train of evils in motion, particularly the enforced servitude of women for the purpose of recruiting inmates for the authorized houses. Ultimately, widening knowledge of the fact that regulation, no matter how well it could be accommodated to adequate medical supervision, was serving to increase venereal disease,³ robbed it of its utilitarian justification and led to the abolition movement.⁴

Abolition, or legal prohibition of prostitution, made little progress until the last years of World War I.⁵

¹ Bullough, *The History of Prostitution* 166 (1964); U.N. Pub. (ST/SOA/Ser. M/13) p. 10 (1958).

² Bullough, *op. cit.* at 168.

³ U. N. Pub. (ST/SOA/Ser. M/13) p. 6, para. 2; *Id.*, pp. 87-93; Model Pen. C. Tent. Draft No. 9 at 173 (1959).

⁴ The abolition movement is traced from the enactment of the United Kingdom's Contagious Diseases Act of 1866-69.

⁵ In the United States, the Draft Act of 1917 included a prohibition of prostitution within prescribed areas around military or naval installations. Within two years, nineteen states had strengthened their antiprostitution laws. In July 1941, when the mobilization of the military forces of the United States was underway, the Congress enacted a statute prohibiting prostitution: "... within such reasonable distance of military and/or naval establishments as the Secretaries of War and/or Navy shall determine to be needful to the efficiency, health and welfare of the Army and/or Navy." Pub. Law 163—77th Cong., ch. 287, 1st Sess., H.R. 2475.

Thereafter, more and more countries abandoned regulation. There were some reverses in the trend until World War II but by 1958, twenty-two of the world's principal nations, not including the United States, were signatories to an international convention calling for the suppression of prostitution.⁶

Except for a few tentative and quickly abandoned experiments, the United States did not try to respond to the problem of prostitution by regulation and licensing. No official notice was taken of this social phenomenon although the "redlight district" and the "house of ill fame" were commonplace in almost all American cities.⁷

The publication of Flexner's classic study of European regulated prostitution in 1913⁸ and the prohibition of prostitution in the Draft Act of 1917 influenced a marked change in public attitudes. By the early 1920's legislation prohibiting prostitution found public favor and legal abolition rapidly became the accepted means of suppressing prostitution in all jurisdictions of the United States.⁹

There can be no doubt that this legislation was extremely effective in suppressing the visible manifestations of commercialized vice. It wiped out the commonplace house of ill-fame almost completely and eliminated the "redlight" district from the American urban scene.¹⁰

Prostitution continues, however, in our contemporary society but in very different forms. In a population with very tolerant attitudes toward sexual conduct, it is not concentrated in segregated areas, it is far more individualized, mobile and transient in its character and generally less visible.¹¹

Apart from its importance as a means of checking the spread of venereal disease, legislation to suppress prostitution was motivated by concern for the personal degradation, abuse and coercion to which the prostitute was and still is subjected. During the 19th century when prostitution was a legalized or tolerated social institution, the demand for women to meet the needs of the business gen-

⁶ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Res. 317 (IV), Gen. Assembly of the U.N.

⁷ Bullough, *op. cit.*, ch. XV.

⁸ Flexner, *Prostitution in Europe* (1913).

⁹ *Model Pen. C. Tent. Draft No. 9*, p. 169; see, generally, *The Prevention and Repression of Prostitution in North America*, U.N. Pub. (ST/SOA/Ser. M/13) p. 15.

¹⁰ Ill. Crim. Code (1961), Comment to Section 11-14; Bullough, *op. cit.* (fn 1), ch. XV.

¹¹ One aspect of contemporary prostitution that has increasingly visible aspects is the street corner solicitation of motorists by prostitutes from ghetto areas who congregate at strategic intersections in the downtown areas of the cities.

erated an international commerce in women which became known in this country as the "white slave" traffic. The term is a misnomer in one sense since the traffic embraces women of all nations and races but not in its connotation of servitude. Human beings were literally sold and exchanged as if they were slaves. This is perhaps explained, in part, by the extraordinary and curious submissiveness displayed by prostitutes to the pimp or panderer that can still be observed in the contemporary world. International compacts have been enacted which have been instrumental in suppressing this traffic and they have been matched by internal legislation of which the Mann Act is a familiar example.¹² The gradual disappearance of the organized prostitution of the 19th and early 20th centuries has been followed by a significant decline in "white slavery" but should social conditions change in such a way as to permit the toleration of commercialized sexual activity, coercive recruitment methods can be expected to recur.¹³

In addition to these motivations for the legal suppression of prostitution, it is morally reprehensible to a large segment of the population. There is little reason to believe that it would be tolerated in California today as it was in many parts of the state before World War II.

Public health authorities and the medical profession are united in the opinion that prostitution must be repressed.¹⁴ This opinion is based upon persuasive evidence that tolerated or licensed prostitution, even when accompanied by medical supervision, results in an increase of the venereal disease rate. This has been dramatically demonstrated by studies made in various parts of the world when prostitution was outlawed.¹⁵ Experimentation with controlled prostitution in Honolulu is particularly persuasive. After a brief period of suppression, a system of regulated prostitution under the direction of the Honolulu Police Department was put into effect in 1930. It was accompanied by medical supervision but prostitution as a source of venereal disease infection became so serious in 1944 that the government closed all the controlled

¹² George, *Legal, Medical and Psychiatric Considerations in the Control of Prostitution*, 60 Mich. L. Rev. 732 (1962); Bullough, *op. cit.*, pp. 181-185.

¹³ See Thornton, *Organized Crime in the Field of Prostitution*, 46 J. Crim. Law, Crim. and Pol. Sci. 774 (1956).

¹⁴ *Model Pen. C. Tent. Draft No. 9*, p. 173.

¹⁵ George, *op. cit.* (fn 12), p. 738; Wilcox, *Prostitution and Venereal Disease*, U.N. Pub. *op. cit.* (fn 1), p. 67.

houses in the city. The result was a steady decline in the venereal disease rate. From 1944 through 1952 it dropped from a high of more than 3,000 cases per year to slightly under one thousand.¹⁶

This improvement in public health is attributed not only to the closing of controlled houses in Honolulu but to more vigorous efforts by the local department of public health and the military authorities to maintain a venereal disease program not only in Honolulu but throughout the Islands.¹⁷

The experience in Honolulu did not support the commonly expressed view that the repression of prostitution causes an increase in sex offenses. Rape and other sex crimes, including prostitution, actually declined during the period 1942-1951. The criminogenic aspects of prostitution, however, have not been the subject of significant research. As an illegal activity, its crime generating potential is well known¹⁸ and this may continue where it is permitted subject to regulation.

The evidence, however, is difficult to evaluate and on the basis of the information presently available, it must be conceded that it is insufficient to determine the question. It is not likely that such evidence will become available because in the absence of areas in which prostitution is institutionalized in the traditional way, comparative and empirical investigation is not possible.

The Wolfenden Report¹⁹ is filled with descriptions of the phenomenon of prostitution in Great Britain, the activities of the police in curbing its practitioners and the deficiencies of the prostitution laws as they existed in 1957. Somewhat inexplicably it does not address itself to the public health aspects of prostitution nor does it make any endeavor to evaluate or refer to the reasonably abundant reports, statistics and studies of this important question. Perhaps, typically, it appears to look upon the subject from the viewpoint of the proper English gentleman: ". . . we feel that the right of the normal, decent citizen to go about the streets without affront to his or her sense of decency should be the prime consideration

¹⁶ 39 J. Social Hygiene 316 (1953).

¹⁷ See, generally, Quisenberry, Was "Controlled" Prostitution Good for Hawaii," 39 J. Social Hygiene 312 (1953).

¹⁸ Ploscowe, Sex and the Law, p. 265 (1951).

¹⁹ Report of the Committee on Homosexual Offenses and Prostitution, Authorized Amer. Ed. with Intro. by Karl Menninger, M.D.

and should take precedence over the interests of the prostitute and her customers.”²⁰ “. . . What the law can and should do is to ensure that the streets of London and our big provincial cities should be freed from what is offensive or injurious and made tolerable for the ordinary citizen who lives in them or passes through them.”²¹

It is in only two of 297 recommendations that the committee acknowledges that it is not impressed by the argument for controlled prostitution in so far as this implies some medical safeguard. It concludes the issue by the relying upon the experience of the great body of nations which have abolished the brothel: “In our view,” the Commission reports, “the toleration of brothels by the State would be a retrograde step.”²²

What the Commission did do consistent with its concern for the English right to be free of annoyance on the public streets, was to leave the existing law by which the act of prostitution itself is not made a criminal offense unchanged. In all other categories of the laws relating to prostitution it urged that the statutes be made stronger and more effective. In particular, it recommended that the prohibition against solicitation or accosting on the public streets be revised to eliminate the requirement that such conduct annoy others; it favored increasing the maximum penalties for street offenses; it suggested procedures for the remand of prostitutes to custody not to exceed three weeks in cases of repeated offenders; it approved retention of the maximum penalty of two years imprisonment for one who lives on the earnings of a prostitute and the strengthening of the statutes relating to the leasing or furnishing of premises used as brothels.²³

Except for its opinion that individual prostitution should not be made criminal, an attitude somewhat inconsistent with its recommendations with respect to permitting property to be used as a place of prostitution, the Wolfenden Committee's recommendations accord with the general pattern of laws here and abroad which impose criminal sanctions on prostitution and related offenses.

²⁰ *Id.*, p. 140.

²¹ *Id.*, p. 155.

²² *Id.*, p. 159.

²³ *Id.*, pp. 189-190.

Conclusion.

Individuals, societies and cultures will assign differing weights to the arguments for and against tolerated prostitution. On the medical evidence, however, the unanimity of public health authorities in their demand for prohibitory legislation cannot be ignored.²⁴ There are also serious social values which compel the conclusion that the dangers of prostitution to the immature and to the dependent require the protection of the criminal law. More comprehensively, the personal degradation which is such an inevitable concomitant of prostitution and the well-documented evils of traffic in women with its concomitant servitude and coercion make it apparent that unsatisfactory as control through the criminal law may be, it should not be abandoned.

The draft which follows is designed to protect these values and, in general, to maintain the existing pattern of the law in the United States.

Section 1800. Prostitution

Any person who solicits another to engage in or who engages in any sexual conduct with another for money [or other consideration] is guilty of prostitution. In any prosecution for an offense under this chapter, the sex of the parties concerned is immaterial.

Prostitution is a petty misdemeanor.

COMMENT

Section 1800. Prostitution

This section is substantially a restatement of existing law. *Penal Code Section 647(b)*. In its application to conduct of persons of the same sex or of opposite sexes, it conforms to contemporary criminal law revision in other jurisdictions and to the Model Penal Code.

Traditionally, the act of prostitution has been defined in statutes or by decisional law in terms of sexual intercourse

²⁴ The hope that venereal disease would yield to modern "miracle" drugs has not been realized. "When penicillin was introduced during World War II, it was predicted that the 2 major venereal diseases, syphilis and gonorrhea, ultimately would be eradicated. This optimistic forecast appeared to be justified as the incidence of syphilis steadily declined in the U.S.A., reaching a record low of 6,251 cases in 1957. However, in 1958 an abrupt reversal of the downward trend developed, since followed by an accelerated increase in incidence annually. In 1964 there were 22,733 reported cases of infectious syphilis in the U.S.A., with probably an additional 60,000 to 70,000, or more, unreported. No reliable statistics are available for the incidence of gonorrhea, but the totals undoubtedly run much higher." Merck Manual, 11th ed., Title 20 (1966).

(*People v. Severino*, 122 Cal. App. 2d 172, 264 P.2d 656 (1954).) In an endeavor to bring other forms of sexual activity within the scope of the law, sexual intercourse has been broadly defined to include homosexual relations (Model Penal Code), deviate sexual relations (Model Penal Code, Illinois Criminal Code) or lewd acts (California Penal Code). The term "sexual conduct" used in the draft is offered as a simpler and more inclusive definition of the scope of the proposed statute. It was suggested by *Section 230.00 of the New York Revised Penal Law*. The commercial character of the conduct involved is expressed in the words "for money." The Model Penal Code speaks in terms of sexual activity "as a business"; the New York Penal Law uses the word "fee"; and *California's Penal Code Section 647(b)* uses the words "money or other consideration." Since money is invariably the form in which consideration is paid for indiscriminate sexual intercourse so essentially characteristic of prostitution, it seems more desirable to use this word in the statute as does *Section 11-14 of the Illinois Criminal Code of 1961*. To add to this the words "or other consideration" might well extend the scope of the statute to reach relationships which although not licit, lack the indiscriminate character of the conduct embraced in the ordinary meaning of prostitution.

This offense is tentatively graded as a petty misdemeanor upon the assumption that it is better to have a penalty structure which conforms substantially to actual practice than to provide maxima which are rarely used.²⁵

[Section 1801. Patronizing a Prostitute

(1) A person is guilty of patronizing a prostitute if he offers to pay or pays money to engage in sexual conduct with a prostitute; or

(2) Enters or remains in a place of prostitution with intent to engage in sexual conduct.

Patronizing a prostitute is a petty misdemeanor.]

²⁵ The revised New York State Criminal Code, which, when it goes into effect September 1, (1967) will reduce the maximum penalty for prostitution from one year to fifteen days, . . ." (this reduction in maximum penalty was probably influenced by judicial doubt about the effectiveness of harsher penal sanctions) "while four and six month sentences were once common, a prostitute rarely gets more than two months these days. . . . The gradual reduction in sentences is probably due chiefly to a growing belief among judges that prison does not deter prostitutes." New York Times, August 14, 1967.

COMMENT

Section 1801. Patronizing a Prostitute

This offense appears to have been first defined in *Model Penal Code Section 251.2(5)*. It was adopted in the New York and Illinois revisions. The original proposed New York revision did not include this offense. The revision staff comment discloses that its adoption was the result of strongly expressed sentiment in the course of public hearings. According to the staff, "the reasons most vigorously advanced are: one, that criminal sanctions against the patron as well as the prostitute should aid in the curtailment of prostitution; and, two, that to penalize the prostitute and exempt the equally culpable patron is inherently unjust."

The words, "offers to pay or pays money" in Proposed Section 1801, are stated without reference to any particular recipient in order to embrace payments to pimps and panderers as well as to the prostitute.

The purpose of Subsection (2) is designed to reach the anticipatory stage of the conduct with which this offense is concerned.

This offense is graded as a petty misdemeanor since its scope is substantially the same as Section 1800, which is similarly graded.

This proposed statute is placed in brackets because the scope of Section 1800 is probably broad enough to cover most of the conduct which is likely to fall within Section 1801 and because the proscribed acts of entering or remaining appearing in Subsection (2) may be considered too minimal to serve as a basis for a criminal offense.

[Section 1802. Inmate of a Place of Prostitution]

Any person who uses any house, room or other place to engage in acts of prostitution as a business is guilty of a petty misdemeanor.]

COMMENT

Section 1802. Inmate of a Place of Prostitution

This draft is based upon *Penal Code Section 315* which defines the offense commonly known as being an inmate of a house of prostitution. This offense is defined in *Model Penal Code Section 251.2* as part of the definition

of the crime of prostitution but it is not included in the New York Revised Penal Law and it was consciously rejected by the draftsmen of the Illinois Criminal Code of 1961 as unnecessary because of the disappearance of the bawdy house or house of ill fame. The draftsmen also expressed the opinion that persons who fell within the concept of "inmate" would be liable under the Illinois code's definition of accountability (complicity).

The proposed draft section is suggested as a definition of the offense of being an inmate. It omits the restrictive connotation of "house" which apparently prevailed in Illinois and is in accord with existing California law. Although the provisions of *Penal Code Sections 315 and 316* use the expressions "house of ill fame" and "house for the purpose of assignation or prostitution," *Penal Code Section 266(i)*, the most comprehensive and most frequently used anti-prostitution statute, refers to "any place" in which prostitution is encouraged or allowed. This has been defined broadly enough to reach "Room 1500 of the Fairmont Hotel . . ." *People v. Schultz*, 238 Cal. App. 2d 804, 48 Cal. Rptr. 328 (1965).

If it is considered necessary or desirable to include this kind of statute in a statutory scheme for the minimizing of prostitution, the statute should not be restrictive but should extend generally to any *situs* which may be used or maintained as a place of prostitution.

Section 1803. Promoting Prostitution

A person is guilty of promoting prostitution who:

(1) owns, controls, manages, supervises or otherwise keeps, alone or in association with others, a place of prostitution or a prostitution enterprise; or

(2) knowingly solicits, induces or causes a person to commit or engage in prostitution with others or to reside in or occupy a place of prostitution; or

(3) accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

Promoting prostitution is a felony of the third degree.

COMMENT

Section 1803. Promoting Prostitution

In part, this section follows the Model Penal Code by defining a single comprehensive offense covering various aspects of conduct engaged in by those who exploit prostitutes for their own benefit. It differs from the Model Penal Code draft by its limitation to conduct which is characteristic of prostitution carried on as a commercial enterprise. Less organized or less commercial aspects of aiding prostitution are treated separately in Section 1804 and graded as misdemeanors. This device avoids the confusion of the rather awkward grading provisions of *Model Penal Code Section 251.2(3)* by creating three classifications into which conduct of similar gravity may be placed: promoting prostitution, abetting prostitution and compelling prostitution.

The classification proposed in draft Section 1803 does not include the transportation of prostitutes, which is certainly an integral aspect of organized prostitution activity, because it appeared that this might involve rather marginal participation not properly punishable as a felony. For this reason transportation is treated as "abetting prostitution," a misdemeanor, in the next section. Otherwise, it is believed that the section reaches all of the acts covered by existing legislation.

Section 1804. Abetting Prostitution

A person is guilty of abetting prostitution who:

- (1) solicits a person to patronize a prostitute; or
- (2) procures a prostitute for a patron; or
- (3) knowingly and for the purpose of prostitution, transports any person into, out of or within the state, or who procures or pays for the transportation of any person into, out of or within the state for the purpose of prostitution; or
- (4) knowingly permits prostitution in any premises under his possession or control or fails to make reasonable effort to halt or abate such use.

Abetting prostitution is a misdemeanor.

COMMENT

Section 1804. Abetting Prostitution

It is the purpose of this draft section to define conduct in aid of prostitution which is not necessarily a part of an organized criminal enterprise. The conduct of the hotel clerk, taxicab driver or other entrepreneur who provides prostitution services on his own account is the kind of activity sought to be embraced by the first two subsections. The fourth subsection is a clearer and more comprehensive sanction against knowingly permitting any premises to be used for the purposes of prostitution than existing legislation. *Penal Code Section 316.*

The third subsection which deals with knowing transportation of persons in aid of prostitution is new law. It is surprising that this important aspect of organized prostitution has not been dealt with in the California Penal Code. This has probably been due to the fact that prostitution enterprises large enough to result in major prosecution have probably been dealt with as conspiracies. In any event, it seems to be desirable to define transportation of prostitutes as a specific offense since it is of equal if not more importance than other kinds of conduct falling within the scope of existing law.

The transportation of prostitutes as an offense, however, presents a problem of grading. Since it is inevitably involved in organized prostitution enterprises, it could be defined quite logically as promoting prostitution, a felony. On the other hand, transportation is equally characteristic of lesser prostitution activities for which a misdemeanor penalty would be appropriate. Large scale enterprises can be prosecuted as conspiracies in the event that it appears desirable to treat them as felonies.

Section 1805. Compelling Prostitution

A person is guilty of compelling prostitution who:

- (1) by force, threat or duress compels another to engage in prostitution; or
- (2) causes or aids a person under the age of eighteen to commit or engage in prostitution; or
- (3) causes or aids his wife, child or any person whose care, protection or support he is responsible for, to commit or engage in prostitution.

Compelling prostitution is a felony of the third degree.

COMMENT

Section 1805. Compelling Prostitution

This section groups together conduct in aid of prostitution which is accompanied by force or duress, which exploits the immature, or which victimizes a dependent person. This broadens existing law by addressing itself directly to the exploitation of dependents and by grading such conduct as a felony. The present law defines a number of misdemeanors on the order of permitting minors to be in houses of prostitution, using minors to deliver messages to such places and the like. The far more serious act of leading a minor into a life of prostitution is dealt with in *Penal Code Section 266* and graded as a felony but it is far too broad because of its inclusion of merely illicit conduct. Draft Section 1805(2), supplemented by the misdemeanor of contributing to the delinquency of a minor, ought to provide a more adequate and effective statutory scheme.

Subsection (3) extends the scope of present *Penal Code Section 266(g)* to cover not only the actor's wife but also his children and other dependents. The level of the seriousness of this conduct is the same and there is no reason to restrict it to the actor's spouse.

Section 1806. Evidence

On the issue whether a premise is a place of prostitution the following shall be admissible evidence: its general repute and the repute of the persons who reside in or frequent the place. In a prosecution for any offense in this chapter, the privileges defined in *Evidence Code Sections 970, 971 and 980* do not apply.

COMMENT

Section 1806. Evidence

The California Evidence Code does not supersede the provision of *Penal Code Section 315* which expressly makes evidence of "common repute" admissible to prove the character of an alleged place of prostitution. This special rule appears in most legislation dealing with prostitution. It is restated in the draft in the same terms as in *Model Penal Code Section 251.2(6)*. The removal of the bar of the spousal privilege, now contained in *Penal Code*

Sections 266(h) and 266(i), is also restated because it is not covered in the Evidence Code.

NOTE: Abatement. *Penal Code Sections 11225-11235* provide comprehensive procedural provisions for the abatement of places of prostitution. It does not seem useful or desirable to include them in a substantive code of criminal law, hence they are omitted from the draft. They should probably be included as part of a general nuisance abatement statute in a code of criminal procedure.

o



